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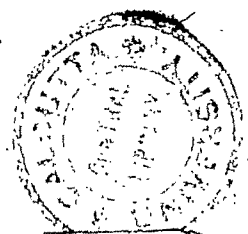
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tee of Naval Experts was made on January 8, 1949. As this report "did not seem entirely conclusive," the Court on January 17, 1949, requested the experts to proceed to Sibenik and Saranda to make investigations on the spot, with a view to verifying, completing or modifying their report; a report on this inquiry was made by the experts on February 8, 1949.⁵ The two reports, as well as questions later addressed to the experts by three members of the Court, and the replies, were annexed to the judgment,⁶ and representatives of the Parties were permitted to comment on the experts' reports.

The final submissions of the United Kingdom were as follows:

Question (1) of the Special Agreement.

The Government of the United Kingdom asks the Court in this case to adjudge and declare as follows:

(1) That, on October 22nd, 1946, damage was caused to His Majesty's ships *Saumarez* and *Volage*, which resulted in the death and injuries of 44, and personal injuries to 42, British officers and men by a minefield of anchored automatic mines in the international highway of the Corfu Strait in an area south-west of the Bay of Saranda;

(2) That the aforesaid minefield was laid between May 15th and October 22nd, 1946, by or with the connivance or knowledge of the Albanian Government;

(3) That (alternatively to 2) the Albanian Government knew that the said minefield was lying in a part of its territorial waters;

(4) That the Albanian Government did not notify the existence of these mines as required by the Hague Convention VIII of 1907 in accordance with the general principles of international law and humanity;

(5) That in addition, and as an aggravation of the conduct of Albania as set forth in Conclusions (3) and (4), the Albanian Government, or its agents, knowing that His Majesty's ships were going to make the passage through the North Corfu swept channel, and being in a position to observe their approach, and having omitted, as alleged in paragraph 4 of these conclusions, to notify the existence of the said mines, failed to warn His Majesty's ships of the danger of the said mines of which the Albanian Government or its agents were well aware;

(6) That in addition, and as a further aggravation of the conduct of Albania as set forth in Conclusions (3), (4), and (5), the permission of the existence without notification of the minefield in the North Corfu Channel, being an international highway, was a violation of the right of innocent passage which exists in favour of foreign vessels (whether warships or merchant ships) through such an international highway;

(7) That the passage of His Majesty's ships through the North Corfu Channel on October 22nd, 1946, was an exercise of the right of innocent passage, according to the law and practice of civilized nations;

(8) That, even if, for any reason, it is held that conclusion (7) is not established, nevertheless, the Albanian Government is not thereby relieved of its international responsibility for the damage caused to

⁵ Commodore Bull did not take part in the inquiry.

⁶ I.C.J. Reports, 1949, pp. 142-150, 152-162, 163-169.

the ships by reason of the existence of an unnotified minefield of which it had knowledge;

(9) That in the circumstances set forth in the Memorial as summarized in the preceding paragraphs of these Conclusions, the Albanian Government has committed a breach of its obligations under international law, and is internationally responsible to His Majesty's Government in the United Kingdom for the deaths, injuries and damage caused to His Majesty's ships and personnel, as set out more particularly in paragraph 18 of the Memorial and the Annexes thereto;

(10) That the Albanian Government is under an obligation to the Government of the United Kingdom to make reparation in respect of the breach of its international obligations as aforesaid;

(11) That His Majesty's Government in the United Kingdom has, as a result of the breach by the Albanian Government of its obligations under international law, sustained the following damage:

Damage to H.M.S. <i>Saumarez</i>	£750,000
Damage to H.M.S. <i>Volage</i>	75,000
Compensation for the pensions and other expenses incurred by the Government of the United King- dom in respect of the deaths and injuries of naval personnel	50,000
	<hr/> £875,000

Question (2) of the Special Agreement.

I ask the Court to decide that on neither head of the counter-claim has Albania made out her case, and that there is no ground for the Court to award nominal damages of one farthing or one franc.

The final submissions of Albania were translated as follows:

Question (1) of the Special Agreement.

(1) Under the terms of the Special Agreement of March 25th, 1948, the following question has been submitted to the International Court of Justice:

"Is Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?"

The Court would not have jurisdiction, in virtue of this Special Agreement, to decide, if the case arose, on the claim for the assessment of the compensation set out in the submissions of the United Kingdom Government.

(2) It has not been proved that the mines which caused the accidents of October 22nd, 1946, were laid by Albania.

(3) It has not been proved that these mines were laid by a third Power on behalf of Albania.

(4) It has not been proved that these mines were laid with the help or acquiescence of Albania.

(5) It has not been proved that Albania knew, before the incidents of October 22nd, 1946, that these mines were in her territorial waters.

(6) Consequently, Albania cannot be declared responsible, under international law, for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage and loss of human life which resulted from them. Albania owes no compensation to the United Kingdom Government.

Question (2) of the Special Agreement.

(1) Under the terms of the Special Agreement concluded on March 25th, 1948, the International Court of Justice has before it the following question:

“Has the United Kingdom under international law violated the sovereignty of the Albanian People’s Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946, and is there any duty to give satisfaction?”

(2) The coastal State is entitled, in exceptional circumstances, to regulate the passage of foreign warships through its territorial waters.

(3) This rule is applicable to the North Corfu Channel.

(4) In October and November, 1946, there existed, in this area, exceptional circumstances which gave the Albanian Government the right to require that foreign warships should obtain previous authorization before passing through its territorial waters.

(5) The passage of several British warships through Albanian territorial waters on October 22nd, 1946, without previous authorization, constituted a breach of international law.

(6) In any case that passage was not of an innocent character.

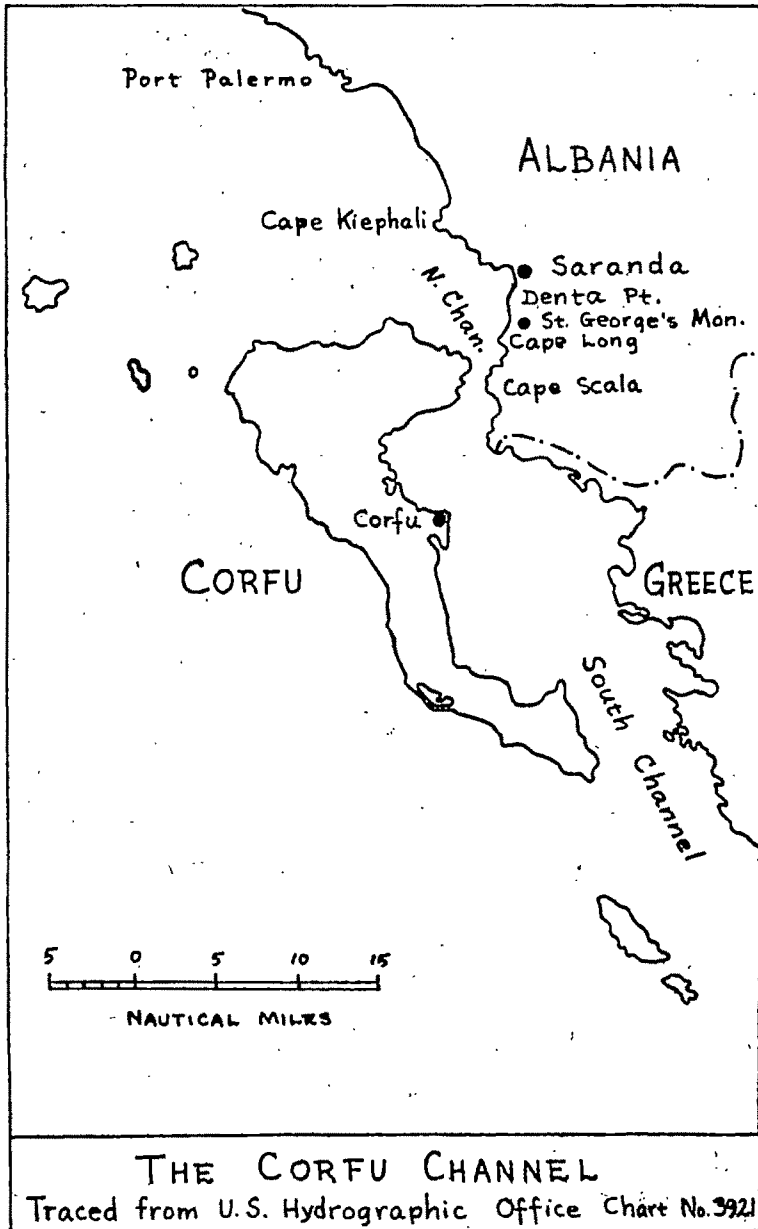
(7) The British naval authorities were not entitled to proceed, on November 12th and 13th, 1946, to sweep mines in Albanian territorial waters without the previous consent of the Albanian authorities.

(8) The Court should find that, on both these occasions, the Government of the United Kingdom of Great Britain and Northern Ireland committed a breach of the rules of international law and that the Albanian Government has a right to demand that it should give satisfaction therefor.

The Court’s judgment on the merits was handed down on April 9, 1949, in English and French, the latter version being authoritative.⁷

The bare facts may be summarized as follows: The Strait of Corfu, between the Greek Island of Corfu and the mainland on the east, has two narrow channels at its extremities, between which is a wider area. The port of Corfu is on the island side of this wider area. The South Channel, less than five miles wide, lies between the island and Greek territory on the mainland. The North Channel, barely more than one mile wide at its narrowest point and less than six miles wide at other points, lies between the island and Albanian territory on the mainland; the whole of its area

⁷ L.C.J. Reports, 1949, p. 4; this JOURNAL, Vol. 43 (1949), p. 558. The judgment is admirably summarized in 1949 A.M.C. 1239-1284.



is territorial waters of the two states, the median line being the international boundary. Within the North Channel, and immediately north of the northern entrance to its narrowest part, lies the Bay of Saranda, territorial waters of Albania, on which is the port of Santi Quaranta (also called Saranda, and Porto Edda).

In October, 1944, the North Corfu Channel was swept for mines by the British Navy, and, none being found, it was announced to be a safe route; early in 1945, it was check-swept with negative results. On May 15, 1946, two British cruisers passing through the Channel were fired upon by an Albanian shore battery; this led to diplomatic exchanges between the British and Albanian governments, the former claiming a right of innocent passage through the Channel, and the latter denying any right to pass through its territorial waters without notification to and permission from Albanian authorities.

On October 22, 1946, four British warships proceeding northward from the port of Corfu undertook to pass through the North Corfu Channel—the cruiser *Mauritius* followed by the destroyer *Saumarez*, and at two miles astern, the cruiser *Leander* followed by the destroyer *Volage*. The voyage was designed to “test Albania’s attitude,” at a time when the United Kingdom Government was considering the establishment of diplomatic relations with Albania, and when, in the words of the British Admiralty, it wished “to know whether the Albanian Government have learnt to behave themselves.” Outside the Bay of Saranda but within Albanian territorial waters, the *Saumarez* struck a mine and was heavily damaged; while it was being towed by the *Volage*, the latter struck a mine and was much damaged.

On November 13, 1946, the North Corfu Channel was swept by British mine-sweepers, acting under the protection of a covering force. This “Operation Retail” was carried out in Albanian waters, without Albania’s consent. In the course of the operation, twenty-two moored mines of the German GY type were cut; it was established before the Court that the mine-field had been recently laid.

The Court first considered whether the explosions which occurred on October 22, 1946, were caused by mines belonging to the mine-field discovered on November 13, 1946, and concluded that this was the fact. A contention that Albania had laid the mines had not been pressed by the United Kingdom, and in the circumstances the Court paid little attention to it. An alternative contention was that the mine-field was laid by two Yugoslav warships shortly prior to October 22, 1946, acting with the connivance of the Albanian Government; but the evidence presented failed to sustain the contention, and the Court was unable to identify the authors of the mine-laying.

It was also contended by the United Kingdom Government that the mines could not have been laid without the knowledge of the Albanian Government. On this point the Court said:

It is clear that knowledge of the mine-laying cannot be imputed to the Albanian Government by reason merely of the fact that a mine-field discovered in Albanian territorial waters caused the explosions of which the British warships were the victims. It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors.

However, the Court was willing to consider inferences of fact, "provided that they leave *no room* for reasonable doubt." As Albania had "kept a close watch over the waters of the North Corfu channel" during the period when the mines must have been laid, its assertion of ignorance was "*a priori* somewhat improbable." Moreover, the Albanian Government "did not notify the presence of mines in its waters, at the moment when it must have known this, at the latest after the sweep on November 13th," and made no inquiry or judicial investigation into the facts. Its attitude was not inconsistent with a desire that the circumstances of the mine-laying operation should remain secret.

As to the feasibility of observing mine-laying from the Albanian coast, the Court pointed out that owing to its geographical configuration the Bay of Saranda and the Channel could easily be watched, the heights offering excellent observation-points. Hence the laying of the mine-field "could hardly fail to have been observed by the Albanian coast defenses." Though the existence of a look-out post at Cape Denta had not been proved, Albania admitted that such posts were stationed at Cape Kiephali and at St. George's Monastery. Relying on the experts' report, the Court reached the conclusion that the laying of the mine-field which caused the explosions on October 22, 1946, "could not have been accomplished without the knowledge of the Albanian Government."

The obligations resulting for Albania from such knowledge were not in dispute. The Albanian authorities should have notified the existence of the mine-field "for the benefit of shipping in general," and warning should have been given to the approaching British warships of the imminent danger to which they were exposed.

Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the

freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

No notice or warning was given. Even if the mine-laying had been done on the night before October 22, 1946, so that a general notification would have been difficult or impossible before the time of the actual explosions, the approach of the British warships was known sufficiently in advance of that event for warning to have been given. "These grave omissions involve the international responsibility of Albania," and the Court held by eleven votes to five that Albania was under a duty to pay compensation to the United Kingdom.

The question then arose as to the Court's jurisdiction to assess the amount of the compensation due. Albania denied that such jurisdiction had been conferred by the Special Agreement. In the first question put by that instrument, the Court was asked: "Is there a duty to pay compensation?" While the text gave "rise to certain doubts," the question would have been superfluous unless the Parties had in mind something more than a mere declaration that compensation was due. An interpretation of the text which would render the provision "devoid of purport or effect" should be avoided. After the Security Council had recommended that "the dispute" be referred to the Court, the United Kingdom Government had filed its application asking the Court to "determine the reparation or compensation," and it had set forth the sums claimed in its Memorial. The claim had not been abandoned; instead it had been maintained by the United Kingdom, and Albania had impliedly accepted the Court's jurisdiction to decide upon the claim. By ten votes to six, the Court arrived at the conclusion that it had jurisdiction to assess the amount of the compensation. Further proceedings with regard to the amounts claimed were found to be necessary; time-limits for these proceedings were fixed by an Order of April 9, 1949, and later extended by an Order of June 24, 1949.⁸

As to the second question placed before it by the Special Agreement, the Court took up the Albanian contention that by sending the warships through the Channel without the previous authorization of the Albanian Government the United Kingdom Government had violated Albanian sovereignty. The view was expressed by the Court that it is

generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.

⁸ I.C.J. Reports, 1949, pp. 171, 222.

Albania contended that the North Corfu Channel, being of secondary importance, not a necessary route between two parts of the high seas, and used almost exclusively for local traffic to and from the ports of Corfu and Saranda, does not belong to the class of international highways through which a right of passage exists. The Court found the decisive criteria to be the geographical situation as connecting two parts of the high seas and actual use for international navigation. It was deemed to be a fact of particular importance that

the North Corfu Channel constitutes a frontier between Albania and Greece, that a part of it is wholly within the territorial waters of these States, and that the Strait is of special importance to Greece by reason of the traffic to and from the port of Corfu.

On these grounds it was held that the Channel

should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace.

"Exceptional circumstances" were said to exist, however. At the time Greece and Albania did not maintain normal relations. Greece had made territorial claims to the Albanian territory bordering on the Channel, and had declared herself technically in a state of war with Albania. Invoking the danger of Greek incursions, Albania had taken certain measures of vigilance in the region. In view of these circumstances—which affect Greece rather than the United Kingdom—the Court expressed the opinion that Albania

would have been justified in issuing regulations in respect of the passage of warships through the Strait, but not in prohibiting such passage or in subjecting it to the requirement of special authorization.

Perhaps this general statement could have been more qualified; it would seem, at any rate, that Albania might have prohibited passage by Greek warships under the circumstances, and practice in other parts of the world, *e.g.*, in the Strait of Gibraltar, might have been examined. The Court seems to gloss over a possible distinction between warships and merchant ships in this connection—a distinction much debated by the parties—except to say that it was not necessary to consider "whether States under international law have a right to send warships in time of peace through territorial waters not included in a strait." One may wish that the judgment had been more illuminating on the whole question as to straits.

The Government of Albania had contended that the passage on October 22, 1946, was not an *innocent passage*, because the warships were on a political mission; they maneuvered and sailed in combat formation; the guns were in fore and aft positions, and the crews were in action stations; the number of the ships and their armament showed an intention

to intimidate; and the ships engaged in observing and reporting on coast defenses. These charges were not wholly substantiated by the evidence, and, having regard to all the circumstances, the Court could not characterize the measures taken by the United Kingdom authorities as a violation of Albania's sovereignty on October 22, 1946. The judgment to this effect was adopted by fourteen votes to two.

Coming to the "Operation Retail" on November 12 and 13, 1946, the Court noted that the United Kingdom did not dispute that this was carried out "against the clearly expressed wish of the Albanian Government." As a ground of justification, the United Kingdom put forward "a new and special application of the theory of intervention"; but the Court regarded "the alleged right of intervention as the manifestation of a policy of force" which cannot "find a place in international law." The Agent of the United Kingdom also sought to classify the operation "among methods of self-protection and self-help"; but even recognizing the "extenuating circumstances," the Court unanimously declared, to "ensure respect for international law, of which it is the organ," that the British action constituted a violation of Albanian sovereignty. This declaration was in itself the "appropriate satisfaction" asked by Albania.

President Basdevant concurred in the operative part of the judgment, though he could not accept the Court's reasons for affirming its jurisdiction to assess the amount of compensation due from Albania. Judge Zoričić did not agree with that part of the judgment relating to Albania's responsibility, for which he found no basis but "suspicions, conjectures, and presumptions." Judge Alvarez concurred in the judgment, but appended an opinion which placed chief stress on a "new international law," founded on "social interdependence."

Dissenting opinions were written by Judges Winiarski, Badawi Pasha, Krylov and Azevedo, and by Judge *ad hoc* Eßer. On the question of Albania's responsibility, Judge Winiarski placed the responsibility on grounds other than those selected by the Court; but the other dissenting judges found no basis for the responsibility. All of the dissenting judges were agreed that the Court had no jurisdiction under the special agreement to assess the amount of compensation. Judges Krylov and Azevedo were of the opinion that the United Kingdom violated Albania's sovereignty on October 22, as well as on November 13, 1946.

THE CORFU CHANNEL CASE (DAMAGES)

At a public sitting on November 17, 1949, the Court began its consideration of the assessment of the compensation due from Albania to the United Kingdom by reason of the losses suffered on October 22, 1946. Albania was not represented at this meeting. By a letter of June 29, 1949, the Albanian Agent had informed the Court that the Government of the

People's Republic held to its view that under the special agreement of March 25, 1948, the Court did not have the power to assess the amount of compensation or to ask Albania for information on the subject. In his observations on this letter, the Agent of the United Kingdom had referred to Article 53 of the Court's Statute. On November 16, 1949, the Deputy Minister of Foreign Affairs of Albania had informed the Court that his government did not deem it necessary to be represented at the meeting of the Court scheduled for the following day.

In reply to a question put by Judge Krylov on November 17, the United Kingdom Agent informed the Court that on two occasions the Albanian Ambassador in Paris had expressed a readiness to discuss the amount of damages due. Counsel for the United Kingdom put forward a claim for damages, totaling £843,947. At the close of the meeting, the Acting President announced that the Court had decided to entrust the verification of the figures of the amount claimed to two experts of Netherlands nationality, Rear Admiral Berek and Engineer De Rooy. An order in this sense was issued later. The report of the Experts was made on December 2; subsequently, the experts appeared before the Court to answer questions.

On December 15, 1949, the Court gave a judgment fixing the amount of the compensation to be paid to the United Kingdom by Albania at £843,947. This judgment was given under Article 53 (1) of the Court's Statute which provides:

Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim.

The question of jurisdiction was held to be *res judicata* by reason of the judgment of April 9; a further examination of the claim put forward by the United Kingdom convinced the Court that the claim was "well founded in fact and law" as required by Article 53 (2) of the Statute.

REPARATION FOR INJURIES SUFFERED IN THE SERVICE OF THE UNITED NATIONS

On December 3, 1948, the General Assembly adopted the following resolution which was promptly communicated to the Registry of the Court:

Whereas the series of tragic events which have lately befallen agents of the United Nations engaged in the performance of their duties raises, with greater urgency than ever, the question of the arrangements to be made by the United Nations with a view to ensuring to its agents the fullest measure of protection in the future and ensuring that reparation be made for the injuries suffered; and

Whereas it is highly desirable that the Secretary-General should be able to act without question as efficaciously as possible with a view to obtaining any reparation due; therefore

The General Assembly

Decides to submit the following legal questions to the International Court of Justice for an advisory opinion:

"I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?

"II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?"

Instructs the Secretary-General, after the Court has given its opinion, to prepare proposals in the light of that opinion, and to submit them to the General Assembly at its next regular session.

In accordance with the provisions of Article 66 of the Statute, notice of the request was communicated to all states entitled to appear before the Court, as well as to the Secretary General of the United Nations.

On December 11, 1948, the President set February 14, 1949, as the date by which states desiring to do so should make their written statements; such statements were made by India, China, the United States of America, the United Kingdom and France,⁹ that by the United Kingdom being the most elaborate and detailed.

The oral proceedings were held on March 7-9, 1949. Statements were made to the Court by Mr. Ivan Kerno and Mr. A. H. Feller on behalf of the Secretary General of the United Nations;¹⁰ by M. Georges Kaeckenbeeck, representative of Belgium; by M. Charles Chaumont, representative of France; and by Mr. G. G. Fitzmaurice, representing the United Kingdom.

The Court's opinion, of which the English version is authoritative, was delivered at a public sitting held on April 11, 1949.¹¹ After preliminary observations, the Court explained the expression "capacity to bring an international claim," and proceeded to deal with the character of the United Nations, referred to as "the Organization." It inquired whether the Organization possesses "international personality"—admittedly "a doctrinal expression"—in the sense of being "an entity capable of availing itself of obligations incumbent upon its Members." As this question is "not settled by the actual terms of the Charter," the Court undertook to "consider what characteristics it was intended thereby to give to the Organization":

⁹ The statements are reproduced in the volume of "Pleadings, Oral Arguments, Documents" relating to the case. A statement by the Union of Burma appears to have been lost in transit, but a copy was transmitted to the Registry after the Court's opinion had been given.

¹⁰ These statements were also reproduced in a separate brochure, published in Holland, as "Oral Statements by Dr. Ivan S. Kerno, Agent, and A. H. Feller, Counsel." Strictly speaking, however, agents and counsel do not appear in advisory proceedings.

¹¹ I.C.J. Reports, 1949, p. 174; this JOURNAL, Vol. 43 (1949), p. 589.

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.

Then followed a review of the Charter; one aspect of the Organization relied on was its capacity to conclude agreements with its Members, which shows that it "occupies a position in certain respects in detachment from its Members." Reference was made to the Convention of 1946 on the Privileges and Immunities of the United Nations, which could operate only "upon the international plane and as between parties possessing international personality." The Court concluded "that the Organization is an international person"—not a state, and still less a "super-State," but "a subject of international law and capable of possessing international rights and duties," and having "capacity to maintain its rights by bringing international claims."

The functions of the Organization are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices, and the Court concludes that the Members have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions.

The Court then proceeded to find that the Organization has capacity to bring "an international claim against one of its Members which has caused injury to it by a breach of its [the Member's] international obligations towards it," such injury involving "damage caused to the interests of the Organization itself, to its administrative machine, to its property and assets, and to the interests of which it is the guardian." The Member cannot contend that its obligation is governed by municipal law. Unless the Organization has capacity to bring an international claim, no reparation would be available to it; it cannot be supposed that all the Members, save the defendant state, should have to combine to bring a claim for the damage suffered by the Organization. The measure of the reparation should depend on the amount of the damage suffered and should be "calculated in accordance with the rules of international law." As illustrations, the Court mentioned that the damage might include reimbursement of any reasonable compensation which the Organization had to pay to its agent, or the expense of replacing a disabled agent.

As to reparation due in respect of the damage caused to the victim agent, the analogy of the traditional rule of diplomatic protection of nationals abroad was thought to supply no answer, either negative or affirmative. The legal bond existing under Article 100 of the Charter between the

Organization on the one hand, and the Secretary General and the staff on the other hand, cannot be assimilated to the bond of nationality between a state and its nationals. Faced with "a new situation," the Court could solve the question only with regard to the provisions of the Charter "considered in the light of the principles of international law." Hence,

the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.

The Organization may find, and it has in fact found, occasion to entrust its agents with important missions in disturbed parts of the world. Adequate protection must be provided for such agents, and the agents themselves must be able to count upon it. These are conditions of the Organization's performance of its functions. To this end, the Members have entered into certain undertakings, both in the Charter and in complementary agreements; the Court stresses the importance of the Members' duty under Article 2 (5) of the Charter to render "every assistance" to the Organization. When an infringement occurs, the Organization should be able to call upon the responsible state to remedy its default. Thus,

the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.

In claiming redress, the Organization "is invoking its own right, the right that the obligations due to it should be respected." In case of a breach of a Member's obligation entered into in the interest of the good working of the Organization, the latter may claim "adequate reparation," and this may "include the damage suffered by the victim or by persons entitled through him."

For the case where the defendant state is not a Member of the Organization, the Court gave a very laconic answer, and it could be thought that the point might have been dealt with more fully. The Court's only reason for an affirmative answer to this part of the first question is that

fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.

The reference to fifty states was due to the search for a fictitious "intention." Perhaps the Court might have found a broader basis for its answer by viewing the situation in 1949 rather than in 1945. In 1949, fifty-eight states were parties to the Charter, and fifteen other states were seeking to become parties. These facts would seem to impart to the Charter the character of an instrument of general international law. This view was

taken by the International Law Commission in framing the preamble to its draft declaration of rights and duties of states, embodied in its 1949 report.¹²

The Court then came to Question II, relating to the reconciliation of action by the United Nations with such rights as may be possessed by the state of which the victim is a national. An injury may engage both the interest of such a state and that of the Organization, and competition might arise between them. In such a case, no rule of law "assigns priority to the one or to the other." The parties should "find solutions inspired by good will and common sense." The Court declared that the fact that the bases of the two claims are different does not mean "that the defendant State can be compelled to pay the reparation due in respect of the damage twice over." The risk of competition between the Organization and the national state might be reduced by general or particular agreements, and the Court had "no doubt that in due course a practice will be developed."

If the agent of the Organization has the nationality of the defendant state, this will present no obstacle to a claim by the Organization for a breach of obligations toward it. "The question of nationality is not pertinent to the admissibility of the claim."

In the *dispositif* of the opinion, the Court gave a unanimous reply to Question I (a), expressing the view that whether the state whose responsibility is involved is or is not a Member,

the United Nations as an Organization has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused to the United Nations.

The reply to Question I (b), adopted by eleven votes against four, was to the effect that whether the state whose responsibility is involved is or is not a Member, the claim may be brought for "damage caused to the victim or to persons entitled through him." The reply to Question II, adopted by ten votes against five, was that

When the United Nations as an Organization is bringing a claim for reparation of damage caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself; respect for this rule will usually prevent a conflict between the action of the United Nations and such rights as the agent's national State may possess, and thus bring about a reconciliation between their claims; moreover, this reconciliation must depend upon considerations applicable to each particular case, and upon agreements to be made between the Organization and individual States, either generally or in each case.

¹² The International Law Commission noted that "a great majority of the States of the world have . . . established a new international order under the Charter of the United Nations, and most of the other States of the world have declared their desire to live within this order." Report of the International Law Commission, General Assembly, Official Records, 4th Sess., Supp. No. 10 (U.N. Doc. A/925), p. 8; this JOURNAL, Supp., p. 15.

Individual concurring opinions were given by Judges Alvarez and Azevedo. Dissenting opinions were given by Judges Hackworth, Badawi Pasha and Krylov, dealing more especially with Question I (b); and Judge Winiarski agreed in general with Judge Hackworth's opinion.

Judge Alvarez suggested that as the United Nations has a political character which may influence its attitude, "an organism and a procedure should be established for dealing with this matter" of claims. Judge Azevedo drew a distinction between officials or experts appointed directly by the Organization, regardless of nationality, and representatives of Members or experts appointed with regard to their countries. As to the former group, he thought the Organization should have priority and could make a claim without having to show a denial of justice or exhaustion of local remedies; as to the latter group, he thought "the main claim will conform to the principle of nationality."

Judge Hackworth's opinion reflects some of the thinking of American constitutional law. On Question I (a) he was willing to apply "the doctrine of implied powers." On Question I (b) he insisted that the Organization is "one of delegated and enumerated powers," and he found "no impelling reason" requiring that the Organization should "become the sponsor of claims on behalf of its employees." The bond between the Organization and its employees does not "have the effect of expatriating the employee or of substituting allegiance to the Organization for allegiance to his State."

International law on this subject is well settled, and any attempt to engraft upon it, save by international compact, a theory, based upon supposed analogy, that organizations, not States and hence having no nationals, may act as if they were states and had nationals is, in my opinion, unwarranted.

In conclusion, Judge Hackworth envisaged the possibility of states' agreeing to allow the Organization to espouse claims on behalf of their nationals in the service of the Organization, in which case "no one could question its authority to do so."

Judge Badawi Pasha thought that it goes without saying that the United Nations must have an international personality, but that its possession of a particular right does not follow as a matter of course. After a careful review of the diverse arguments presented to the Court, he was unable to discover any principle of law warranting an affirmative answer to Question I (b):

The Court's duty is to declare the law in the state of evolution that it has reached; and the Court cannot, in any case, in the presence of new complex and varied cases and contingencies, permit the simple and homogeneous rules, customarily recognized as international law in force, to be the appropriate juristic expression of such situations and contingencies.

Judge Krylov agreed "in a large measure" with the opinions of Judges Hackworth and Badawi Pasha. He thought that the problem posed by Question I (b) should be handled "by the elaboration and conclusion of a general convention." A "new rule of functional protection" would give rise to conflicts with "the international law in force." He could not base

an affirmative reply to Question I (b) either on the existing international convention or on international custom (as evidence of a general practice), or again, on any general principle of law (recognized by the nations).

On December 1, 1949, the General Assembly of the United Nations, taking note of the opinion given by the Court on April 11, 1949, and of proposals submitted by the Secretary General for giving effect to it, authorized the Secretary General

to bring an international claim against the Government of a State, Member or non-member of the United Nations, alleged to be responsible, with a view to obtaining the reparation due in respect of the damage caused to the United Nations and in respect of the damage caused to the victim or to persons entitled through him and, if necessary, to submit to arbitration, under appropriate procedures, such claims as cannot be settled by negotiation.

The Secretary General was also authorized

to take the steps and to negotiate in each particular case the agreements necessary to reconcile action by the United Nations with such rights as may be possessed by the State of which the victim is a national.

A NOTE ON DISSENTING OPINIONS

The dissenting opinions published in the *I.C.J. Reports* for 1949 seem to the writer to raise a question of considerable importance to the authority and prestige of the Court.

It was in spite of determined opposition that a provision for dissenting opinions was included in the original text of the Statute in 1920, and the opposition was again voiced when the Statute was revised in 1929. On both occasions, cogent arguments were advanced against such opinions; unknown in the jurisprudence of some countries, they have been considered to have a weakening effect upon the pronouncement made by a court.¹² In defending them, the writer has long been sensitive to the care which must be exercised to avoid such a result.

As amended in 1945, Article 57 of the Court's Statute provides in English:

¹² Hudson, *Permanent Court of International Justice 1920-1942*, pp. 205-206, 588-589.

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

and in French:

Si l'arrêt n'exprime pas en tout ou en partie l'opinion unanime des juges, tout juge aura le droit d'y joindre l'exposé de son opinion individuelle.

The privilege was formerly confined to "dissenting judges." In practice, the provision of Article 57 has been given an extended application; dissenting opinions have been allowed to be attached to the Court's advisory opinions, and even to its orders; and not uncommonly several dissenting judges have joined in a single dissenting opinion. As revised in 1946, the Rules of Court provide in Article 74 (2) that:

Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not, or a bare statement of his dissent.

Article 84 (2) of the Rules formulates the same privilege with respect to advisory opinions.

What is the office to be served by dissenting opinions? It is suggested that such opinions may serve three purposes: (1) they may relieve the dissenting judge from the imputation of acquiescing in views which he does not hold, though this result could also be achieved by a bare mention of the fact of his dissent; (2) they may give to the reader of a judgment or an advisory opinion an indication of the opposing views with which the majority was confronted when it arrived at the conclusions adopted as those of the Court; and (3) they may tend to put the majority on its mettle to draft the views of the Court in the most persuasive way possible. Incidentally, also, dissenting opinions may blaze trails along which future development of the law should proceed, either at the hands of the Court itself or at the hands of independent jurists.

A judgment of the Court is "final and without appeal." It has "binding force" between the parties in respect of that particular case (Article 59 of the Statute). Yet the Court has no power to proceed directly to an enforcement of a judgment. It has no competence to issue a writ of execution. Having no marshal, no sheriff, no police to do its bidding, the Court is in no way equipped for any attempt at compulsion. The parties' compliance with its judgments is essential to the Court's prestige; but insofar as the Court is concerned with the matter, it must rely upon the persuasion which the statement of its conclusions carries and upon its high position, as "the organ of international law," to bring about such compliance.

This conclusion applies with less force, perhaps, to advisory opinions.

Far more than the advice which an isolated jurisconsult might render, an advisory opinion is formulated only after an essentially judicial procedure has been followed. It must be so cast that it can serve as an authoritative judicial pronouncement on the legal questions with reference to which it has been requested.

Of course these considerations do not place the Court in a position where it should be immune from criticism by competent experts. Do they not, however, require that the Court should be free from criticism from within the bench itself? Does the privilege of the individual judge to write a dissenting opinion warrant an effort on his part to undermine what the majority of the judges have agreed upon to constitute the judgment or opinion of the Court?

As a general rule in the past, dissenting opinions have usually been confined to setting forth the "individual opinions" of the authors. In 1926, the Rules of Court were amended to place this emphasis on their content. In 1928, a resolution of the Court stated that: "Dissenting opinions are designed solely to set forth the reasons for which judges do not feel able to accept the opinion of the Court."¹⁴ More satisfactory is the view expressed by Judge Anzilotti in 1930 that "a dissenting opinion should not be a criticism of that which the Court has seen fit to say, but rather an exposition of the views of the writer."¹⁵ That "Great Dissenter" was most scrupulous in observing this limitation; and his view dominated the Court for many years. In the writer's time on the Court, it was an imperative tenet of the judges' credo; and he recalls more than one occasion when he deleted a phrase from a dissenting opinion upon an intimation by a colleague that it might be taken to reflect a criticism of what the Court had seen fit to say.

In view of this history, the writer is perturbed to find that some of the recent dissenting opinions do not show appreciation of the former practice. For example, he has encountered in the 1949 *Reports* such expressions as the following: "as the Court rightly said" (p. 53); "the conclusions which the judgment draws . . . seem to be ill-founded" (p. 122); the conclusion of the judgment "is only supported by presumptions and even by conjectures" (p. 126); "the Court advances the strange argument" (p. 199); "the Court therefore admits as a postulate. . . . But" (p. 208); "the Court has not endeavored to discover" (p. 208); "the Court was right to set aside" (p. 209); "the Court rejects in general any argument by analogy. . . . But surely the following reasoning of the Court is only an argument by analogy" (pp. 210-211); a position taken by the Court "remains unproved" (p. 215); "the Court cannot sanction by its opinion" (p. 219); "the majority of the Court . . . has not borne in mind" (p. 219).

It is to be hoped that these quotations do not indicate a considered re-

¹⁴ Series E, No. 4, p. 291.

¹⁵ Series B, No. 18, p. 18.

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jection by the present judges of the Court of the principle formulated by Judge Anzilotti in 1930. If that were the case, disastrous consequences might follow for a high judicial institution which can command observance of its judgment and opinions only by its prestige and by the persuasion which the statement of its conclusions imparts. The Court might be placed in the unfortunate position of some national courts, notably the Supreme Court of the United States, in which dissenting judges, continuing the struggle of the conference room, not infrequently direct their opinions to undermining the views expressed by the majority.

Attention might be given to this matter by the Court itself. It could inaugurate a practice—which did not obtain in the writer's time at The Hague—of subjecting each dissenting opinion to a careful scrutiny by the bench as a whole, with a view to the possibility of intimating to the author the desirability of deleting from it any expression susceptible of being interpreted as critical of the views announced as those of the Court. Such may have been one of the purposes of resolutions adopted by the Court on February 17, 1928, and March 17, 1936, requiring that dissenting opinions be circulated among the judges before the second reading of the draft judgment or opinion.¹⁶ It seems at least doubtful that this requirement was ever generally observed. Perhaps some other practice would produce better results toward keeping dissents within the bounds of expressions of individual opinions.

ANGLO-NORWEGIAN FISHERIES CASE

The proceedings in the *Anglo-Norwegian Fisheries Case* were instituted by an application in the form of a letter signed by the Legal Adviser to the Foreign Office of the United Kingdom, bearing the date of September 24, 1949, and communicated to the Registry on September 28, 1949. To support the jurisdiction of the Court, the applicant relied on the declarations made by the United Kingdom and Norway under Article 36 (2) of the Statute of the Court.¹⁷

The application referred to differences which had arisen from time to time between the governments of the United Kingdom and Norway "relating to the limits at sea within which the Norwegian Government are entitled to reserve fishing exclusively to Norwegian vessels." In 1933, the two governments entered into a *modus vivendi* establishing a "Red Line" to mark the outer limit of the area from which British fishing vessels might be excluded. By a decree of July 12, 1935, the Norwegian Government established

¹⁶ See Series E, No. 4, p. 291; No. 12, p. 197; Hudson, *op. cit.*, p. 539.

¹⁷ The U. K. declaration under Art. 36 (2), dated Feb. 28, 1940, was filed with the Secretariat of the League of Nations on March 7, 1940; the latest Norwegian declaration was filed with the Secretariat of the United Nations on Nov. 16, 1946.

lines of delimitation towards the high sea of the Norwegian fisheries zone as regards that part of Norway which is situated northward of 66° 28.8' North latitude. . . .

Forty-eight points were fixed between which the base-lines were to be drawn, reference being made to earlier decrees which fixed the width of the territorial sea of Norway at four sea miles. At the time the Government of the United Kingdom disputed the validity under international law of the limits of the Norwegian fisheries zone prescribed in this decree, and pending settlement of the dispute the governments agreed to observe the "Red Line"; but on September 16, 1948, Norway informed the United Kingdom that it was considered necessary to enforce the line laid down in the 1935 decree. Subsequent negotiations having been unsuccessful, the United Kingdom made application to the Court.

For the purpose of the dispute and "without prejudice to the position that it maintains regarding the extent of Norwegian territorial waters in matters other than fisheries," the United Kingdom conceded that Norway may delimit a fisheries zone extending four sea miles from base-lines "drawn in accordance with the principles of international law"; but it claimed that the base-lines prescribed by the Norwegian decree of July 12, 1935, are in violation of the principles of international law. The United Kingdom therefore asked the Court to declare the principles of international law to be applied in defining base-lines by reference to which the Norwegian Government is entitled to delimit a fisheries zone, to define the base-lines insofar as necessary, and to award damages to the Government of the United Kingdom for all Norwegian interferences with British fishing vessels outside the zone which Norway is entitled under international law to reserve for its nationals.

By an order of November 9, 1949, the Acting President fixed time-limits for the written proceedings, the latest of which is October 31, 1950.

PROTECTION OF FRENCH NATIONALS AND PROTÉGÉS IN EGYPT

This proceeding against Egypt was instituted by an application transmitted to the Court by the French Government on October 13, 1949. To support the jurisdiction of the Court, the applicant invoked Article 13 of the Montreux Convention of May 8, 1937, regarding Abolition of Capitulations in Egypt.¹⁸ This article provides:

Any dispute between the High Contracting Parties relating to the interpretation or application of the provisions of the present Convention, which they are unable to settle by diplomatic means, shall, on

¹⁸ 182 League of Nations Treaty Series, p. 37; Hudson, *International Legislation*, Vol. 7, p. 684; this JOURNAL, Supp., Vol. 34 (1940), p. 201.

the application of one of the parties to the dispute, be submitted to the Permanent Court of International Justice.¹⁹

The French application alleged that since May 15, 1948, about forty French nationals or *protégés* had been placed in detention camps, four of whom were still detained on August 10, 1949, and that property of eight named French nationals or *protégés* had been sequestered.

By way of illustration, the application gave full details concerning the sequestration of the property of M. Alfred Cohen, a Tunisian who is a French *protégé*. It was alleged that M. Cohen's property was sequestered on July 11, 1948, by decrees of the Egyptian Ministry of Finance, issued under authority of a proclamation of May 31, 1948, based on a decree of May 13, 1948, which proclaimed martial law in Egypt; according to the application, the latter decree and the proclamation were issued in connection with the military action taken by the Egyptian Government in Palestine. The proclamation permitted sequestration of the property of two categories of natural persons: those interned or placed under surveillance in application of martial law, and non-resident persons whose activity is contrary to the safety and security of the state. The French Government contended that M. Cohen did not come within the first category, as he was not interned or placed under surveillance but rather was permitted to leave Egypt; and that therefore it was incumbent on the Egyptian Government to prove activities on his part which endangered the security of the state, which that government had not done. Consequently, the measures taken against Cohen were stated to be contrary to the principles of international law and to the Montreux Convention.²⁰ The application alleged that diplomatic negotiations had been in vain, but it did not allege exhaustion of local remedies.

The applicant seeks judgment that the measures taken against the persons and property of French citizens and *protégés* are contrary to the principles of international law and to the Convention of Montreux, and that the Egyptian Government is liable for compensation for the damage suffered.

¹⁹ Art. 37 of the Statute of the International Court of Justice provides that: "Whenever a treaty or convention in force provides for reference of a matter to . . . the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

²⁰ Art. 2 of the Montreux Convention provides:

"Subject to the application of the principles of international law, foreigners shall be subject to Egyptian legislation in criminal, civil, commercial, administrative, fiscal and other matters.

"It is understood that the legislation to which foreigners will be subject will not be inconsistent with the principles generally adopted in modern legislation and will not, with particular relation to legislation of a fiscal nature, entail any discrimination against foreigners or against companies incorporated in accordance with Egyptian law wherein foreigners are substantially interested.

"The immediately preceding paragraph, in so far as it does not constitute a recognized rule of international law, shall apply only during the transition period [from Oct. 15, 1937, to Oct. 14, 1949]."

By an order of October 20, 1949, the Acting President fixed time-limits for the written proceedings, the latest of which is May 30, 1950.

INTERPRETATION OF THE BULGARIAN, HUNGARIAN
AND RUMANIAN PEACE TREATIES

The Bulgarian, Hungarian and Rumanian Peace Treaties signed at Paris on February 10, 1947, and brought into force on September 15, 1947, contain articles²¹ which provide:

Bulgaria [Hungary, Rumania] shall take all measures necessary to secure to all persons under Bulgarian [Hungarian, Rumanian] jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting.

In addition, the Hungarian and Rumanian treaties provide:²²

Hungary [Rumania] further undertakes that the laws in force in Hungary [Rumania] shall not, either in their content or in their application, discriminate or entail any discrimination between persons of Hungarian [Rumanian] nationality on the ground of their race, sex, language or religion, whether in reference to their persons, property, business, professional or financial interests, status, political or civil rights or any other matter.

With reference to disputes concerning the interpretation or execution of the treaties, identical articles²³ provide:

1. Except where another procedure is specifically provided under any Article of the present Treaty, any dispute concerning the interpretation or execution of the Treaty, which, is not settled by direct diplomatic negotiations, shall be referred to the Three Heads of Mission [of the U.S.S.R., the U. K. and the U. S.]. . . . Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.

2. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding.

²¹ Bulgarian Treaty: Art. 2; Hungarian Treaty: Art. 2 (1); Rumanian Treaty: Art. 3 (1). The texts of the treaties are published in U. S. Treaties and Other International Acts Series, Nos. 1649, 1650, 1651; also in Supplement to this JOURNAL, Vol. 42 (1948), pp. 179, 225, 252.

²² Hungarian Treaty: Art. 2 (2); Rumanian Treaty: Art. 3 (2).

²³ Bulgarian Treaty: Art. 36; Hungarian Treaty: Art. 40; Rumanian Treaty: Art. 38.

By communications of April 2, 1949,²⁴ the United States and the United Kingdom charged that the governments of Bulgaria, Hungary and Rumania had deliberately and systematically denied to their peoples the exercise of the rights and freedoms which those governments were pledged to secure to them under the treaties. The notes alleged specific instances in which these rights had been violated, and ended by calling upon the three governments to adopt prompt remedial measures. Australia and New Zealand associated themselves with the three British notes, and Canada with the notes to Hungary and Rumania. Bulgaria, Hungary and Rumania replied to the United States and the United Kingdom by notes of various dates between April 7 and April 21, 1949,²⁵ denying the charges and rejecting the alleged attempts to interfere in their internal affairs.

In April, 1949, the question of the observance of human rights and fundamental freedoms in Bulgaria and Hungary was placed on the agenda of the General Assembly at the request of Australia and Bolivia. On April 30, after Bulgaria and Hungary had declined to take part in the discussions of the question in the Ad Hoc Political Committee,²⁶ the General Assembly adopted on that Committee's report a resolution²⁷ in which the Assembly expressed "its deep concern at the grave accusations made against the Governments of Bulgaria and Hungary," and most urgently drew "the attention of the Governments of Bulgaria and Hungary to their obligation to co-operate in the settlement of all these questions." The Assembly also decided to retain the question on the agenda of its fourth session.

On May 31, 1949,²⁸ the United States and the United Kingdom informed the three countries that the replies to their communications were unsatisfactory, and that disputes had therefore arisen concerning the interpretation and execution of the Peace Treaties; and that as the Bulgarian, Hungarian and Rumanian governments had shown no disposition to join in settling these disputes, the United States and the United Kingdom would refer the matter to the Three Heads of Mission, as provided in the treaties. On the same day, the United States and British Ministers requested meetings of the Three Heads of Mission in Sofia, Budapest and Bucharest to consider the charges. The Soviet Union informed the United States and the United Kingdom on June 11 and 12, respectively,²⁹ that it considered that Bulgaria, Hungary and Rumania had made exhaustive answers to the American and British charges of violation of the Peace Treaties, and that in its opinion the notes of April 2 had been an attempt to utilize the Peace Treaties for intervention in the domestic affairs of the three countries with

²⁴ U. N. Docs. A/985, pp. 5, 8, 11; A/990, pp. 5, 7, 9.

²⁵ U. N. Docs. A/985, pp. 14, 17, 20; A/990, pp. 11, 14, 16.

²⁶ U. N. Docs. A/AC.24/58 and A/AC.24/57.

²⁷ Resolution 272 (III), General Assembly, 3rd Sess., Pt. II, Official Records, Resolutions (U.N. Doc. A/900), pp. 17-18.

²⁸ U. N. Docs. A/985, pp. 22, 23, 25; A/990, pp. 19, 20, 21.

²⁹ U. N. Docs. A/985, p. 48; A/990, p. 34.

the aim of exerting pressure on their domestic policy. Consequently the Soviet Union saw no ground for convening the Three Heads of Mission in any of the countries.

On August 1, 1949, the United States and the United Kingdom drew the attention of the Bulgarian, Hungarian and Rumanian governments³⁰ to the fact that though two months had elapsed since meetings of the Three Heads of Mission had been requested, the disputes remained unresolved. Consequently they requested that the disputes be referred to commissions composed of one representative of each party and a third member selected by mutual agreement of the two parties from the nationals of a third country, as provided in the Peace Treaties. Bulgaria, Hungary and Rumania replied on various dates, from August 26 to September 2, to the United States and United Kingdom notes of August 1.³¹ The three governments asserted that they were fulfilling the Peace Treaties and consequently no disputes existed, and that the United States and the United Kingdom were attempting to interfere in their internal affairs. They therefore declined the invitation to join in forming the commissions.

On September 19, 1949, the United States and the United Kingdom informed Bulgaria, Hungary and Rumania³² that they considered that the three countries had no ground for their declarations that no disputes existed, and that the United States and the United Kingdom would have recourse to all appropriate measures for securing compliance with the terms of the treaties.

The first measure taken by the United States and the United Kingdom was to request the Secretary General of the United Nations on September 20 and 19, respectively,³³ to inform all Members of the United Nations of the diplomatic correspondence concerning the observance of human rights and freedoms in Bulgaria, Hungary and Rumania; copies of the correspondence were annexed to the requests. The question of human rights in Bulgaria and Hungary was already on the agenda of the General Assembly, having been retained from the last session; and the same question with respect to Rumania had been proposed for inclusion in the agenda by Australia on August 20, 1949.³⁴

Speaking before the General Assembly on September 21,³⁵ the Secretary of State of the United States referred to the differences between the United States and Bulgaria, Hungary and Rumania, saying:

... since the three governments seek to support their position on legal grounds, the United States favors submission to the International Court of Justice of the question whether they are under obligation to

³⁰ U. N. Docs. A/985, pp. 58, 59, 60; A/990, pp. 40, 41, 42.

³¹ U. N. Docs. A/985, pp. 61, 63, 65; A/990, pp. 43, 45, 47.

³² U. N. Docs. A/985, pp. 67, 69, 71; A/990, pp. 49, 50, 51.

³³ U. N. Docs. A/985 and A/990.

³⁴ U. N. Doc. A/948.

³⁵ Department of State Bulletin, Vol. 21, No. 535 (Oct. 3, 1949), p. 491.

carry out the treaty procedures. We hope that Bulgaria, Hungary and Rumania will not refuse to accept in advance the opinion of the Court and to act in accordance with it. The United States as an interested party will accept as binding the view of the International Court of Justice.

On September 22, 1949, the General Assembly, on the recommendation of the General Committee, voted to refer the question of observance in Bulgaria, Hungary and Rumania of human rights and fundamental freedoms to the Ad Hoc Political Committee for consideration and report. Discussion of the matter began in the Committee on October 4, and on that date Bolivia, Canada and the United States introduced a draft resolution³⁶ which in substance was later adopted by the Committee and by the General Assembly. Rumania declined an invitation to take part in the Committee's discussions.³⁷ In the debate the United States representative again emphasized that "the United States will accept the advisory opinion of the Court . . . as binding," and expressed the hope that Bulgaria, Hungary and Rumania would do likewise.³⁸ The draft, with minor amendments proposed jointly by Brazil, Lebanon and The Netherlands,³⁹ was adopted by the Committee on October 13, by forty-one votes to five, with nine abstentions.⁴⁰ The General Assembly began debate on the Committee's report on October 21, and adopted the draft resolution⁴¹ on October 22 by a vote of forty-seven to five, with seven abstentions.⁴²

The resolution began by alluding to the function of the United Nations under Article 55 of the Charter to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion," and continued with a recital of the steps taken by the General Assembly and by "certain of the Allied and Associated Powers signatories to the Treaties of Peace" with respect to charges of violations of those rights and freedoms by Bulgaria, Hungary and Rumania. The preamble concluded with the statement that it is important for the Secretary General to be advised authoritatively concerning the scope of his authority under the Treaties of Peace to appoint "third members" of the Commissions. The operative portion of the resolution began with an expression by the General Assembly of its continuing interest in and increased concern at the grave accusations made against Bulgaria, Hungary and Rumania, and recorded the Assembly's opinion that the refusal of the governments of those countries to coöperate in its efforts to examine the charges justifies the Assembly's concern. It was then stated that the General Assembly

³⁶ U. N. Doc. A/AC.31/L.1/Rev. 1.

³⁷ U. N. Doc. A/AC.31/SR.10, p. 2.

³⁸ Department of State Bulletin, Vol. 21, No. 538 (Oct. 24, 1949), p. 623.

³⁹ U. N. Doc. A/AC.31/L.3.

⁴⁰ U. N. Doc. A/AC.31/9, p. 3.

⁴¹ U. N. Doc. A/1043.

⁴² U. N. Press Release, GA/600, Dec. 10, 1949.

Decides to submit the following questions to the International Court of Justice for an advisory opinion:

"I. Do the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand and certain Allied and Associated Powers signatories to the Treaties of Peace on the other, concerning the implementation of article 2 of the Treaties with Bulgaria and Hungary and article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in article 36 of the Treaty of Peace with Bulgaria, article 40 of the Treaty of Peace with Hungary, and article 38 of the Treaty of Peace with Romania?"

In the event of an affirmative reply to question I:

"II. Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the articles referred to in question I, including the provisions for the appointment of their representatives to the Treaty Commissions?"

In the event of an affirmative reply to question II and if within thirty days from the date when the Court delivers its opinion, the Governments concerned have not notified the Secretary-General that they have appointed their representatives to the Treaty Commissions, and the Secretary-General has so advised the International Court of Justice:

"III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties?"

In the event of an affirmative reply to question III:

"IV. Would a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations constitute a Commission, within the meaning of the relevant Treaty articles, competent to make a definitive and binding decision in settlement of a dispute?"⁴³

The resolution concluded with a request to the Secretary General of the United Nations to make available to the Court the relevant exchanges of diplomatic correspondence, and with a decision to retain the question of the observance of human rights and fundamental freedoms in Bulgaria, Hungary and Rumania on the agenda of the fifth regular session of the General Assembly.

A question would seem to have been presented in this case as to the Court's notification of the request to Bulgaria, Hungary and Rumania, and as to its reception of written or oral statements which might be made on behalf of these states. Article 66 of the Statute provides for notification to

⁴³ U. N. Doc. A/1043, pp. 2-3.

states "entitled to appear before the Court," and for the Court's reception of statements by such states. Bulgaria, Hungary and Rumania are not parties to the Statute, and they have not met the conditions laid down in the Security Council's resolution of October 15, 1946,⁴⁴ as conditions precedent to the Court's being open to states not parties to the Statute. Hence it would seem that they are not states "entitled to appear before the Court." Considerable latitude is left to the Court, however, by the provision in Article 68 of the Statute that

In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

In pursuance of this provision, it was possible for the Court to apply by analogy the provisions for intervention in contentious proceedings contained in Article 63 of the Statute, as follows:

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

This course seems to have been taken by the Registrar, for notifications were addressed to the three states on November 7, 1949, in pursuance of Article 63(1) and Article 68 of the Statute, that the Court was prepared to receive written statements relating to the question.

By an order of November 7, 1949, the Acting President of the Court fixed January 16, 1950, as the date of expiry of the time-limit within which states may file written statements.

The Court may be faced with an unwillingness of Bulgaria, Hungary and Rumania to take any part in the advisory proceedings, as they were previously unwilling to collaborate with the General Assembly. In this event, it would be confronted with a situation reminiscent of that presented in 1923, in the *Eastern Carelia Case*,⁴⁵ in which the Soviet Government declined to appear, and in which the Court refused to give an opinion requested by the Council of the League of Nations.

COLOMBIAN-PERUVIAN ASYLUM CASE

This proceeding against Peru was instituted by an application transmitted to the Court by the Colombian Government on October 15, 1949. Peru's declaration under Article 36 (2) of the Court's Statute had expired in 1942; but to support the jurisdiction of the Court, the applicant invoked Article 7 of the Colombian-Peruvian Protocol of Friendship and Coöpera-

⁴⁴ Security Council, Official Records, 1st Year, 2nd Ser., No. 19, pp. 467-468.

⁴⁵ Series B, No. 5; Hudson, World Court Reports, Vol. 1, p. 190.



tion signed at Rio de Janeiro on May 24, 1934,⁴⁶ which provides that if the parties fail to solve their problems by direct diplomatic negotiations, either party

may have recourse to the procedure established by Article 36 of the Statute of the Permanent Court of International Justice, nor may the jurisdiction of the Court be excluded or limited by any reservations that either Party may have made when subscribing to the Optional Clause.⁴⁷

For some aspects of the procedure, the attention of the Court was called to a Colombian-Peruvian Act, signed at Lima on August 31, 1949, which was concluded by the parties after they found themselves unable to draw up a special agreement submitting their dispute to the Court. This Act provided that each party might submit its application unilaterally to the Court without this measure being considered as unfriendly by the other party.

The application alleged that on January 3, 1949, Victor Raúl Haya de la Torre, a Peruvian citizen, sought asylum in the Colombian Embassy at Lima, that the Colombian Ambassador granted the protection sought, and that Peru refused to issue a safe-conduct so that the refugee could leave the country. The application was said to be based on:

(1) The obligations of Peru and Colombia resulting from the Bolivarian Agreement on Extradition, signed at Caracas on July 18, 1911,⁴⁸ which provides in Article 18 that:

Apart from the stipulations of the present Agreement, the signatory States recognize the institution of asylum, in conformity with the principles of international law;

and from the Convention on Asylum drawn up at the Sixth International Conference of American States at Habana on February 20, 1928,⁴⁹ which provides in Article 2 that:

The government of the state may require that the refugee be sent out of the national territory within the shortest time possible; and the diplomatic agent of the country who has granted asylum may in turn require the guaranties necessary for the departure of the refugee with due regard to the inviolability of his person, from the country.

(2) The special juridical nature of the American institution of asylum.
(3) The rules of American positive and customary international law.

⁴⁶ 164 League of Nations Treaty Series, p. 21.

⁴⁷ Art. 37 of the Statute of the International Court of Justice provides that: "Whenever a treaty or convention in force provides for reference of a matter to . . . the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

⁴⁸ Colombia, *Tratados, Convenciones y Acuerdos aprobados por el Congreso Nacional de 1913*, p. 15.

⁴⁹ 132 League of Nations Treaty Series, p. 323; Hudson, *International Legislation*, Vol. 4, p. 2412; this JOURNAL, Supp., Vol. 22 (1928), p. 158.

The application requested the Court to answer two questions as follows:

First Question.—Within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of July 18th, 1911, and the Convention on Asylum of February 20th, 1928, both in force between Colombia and Peru and in general from American international law, was Colombia competent, as the country granting asylum, to qualify the offence for the purposes of said asylum?

Second Question.—In the specific case under consideration, was Peru, as the territorial State, bound to give the guaranties necessary for the departure of the refugee from the country, with due regard to the inviolability of his person?

The Court was also requested to notify the other governments parties to one or both of the two treaties involved in the case, namely, the governments of Ecuador, Bolivia, Venezuela, Brazil, Costa Rica, Cuba, El Salvador, Guatemala, Mexico, Nicaragua, Panama, the Dominican Republic and Uruguay.⁵⁰

Professor J. M. Yepes was designated the Agent of Colombia, and M. Carlos Sayán Álvarez the Agent of Peru, for the purposes of this case. By an order of October 20, 1949, the Acting President fixed time-limits for the written proceedings, the latest being May 30, 1950.

COMPETENCE OF THE GENERAL ASSEMBLY FOR THE ADMISSION OF NEW MEMBERS OF THE UNITED NATIONS

On May 28, 1948, the Court gave an advisory opinion on the conditions of admission of a state to membership in the United Nations, declaring that

a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, is not juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article.

By a resolution of December 8, 1948, the General Assembly recommended that each member of the Security Council and of the General Assembly, in exercising its vote on the admission of new Members, should act in accordance with the opinion of the Court.

When, on September 13, 1949, the Security Council reconsidered the applications of Austria, Ceylon, Finland, Ireland, Italy, Jordan, Korea, Portugal and Nepal, it failed to recommend the admission of these states, though nine of its eleven members supported such a recommendation. The resulting situation was considered at length in the Ad Hoc Political Committee of the General Assembly at its fourth session, and on November 22, 1949, the General Assembly adopted resolutions reaffirming its de-

⁵⁰ Article 63 (I) of the Statute of the Court provides: "Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith."

termination that each of the states named should be admitted to membership, and requesting the Security Council again to reconsider their applications.

With a view to clarifying the question of its competence, the General Assembly also decided on November 22, 1949, to request the Court to give an advisory opinion on the following question:

Can the admission of a State to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent member upon a resolution so to recommend?

This action represents another stage in the long struggle to secure approval of pending applications for membership in the United Nations. Up to this time, such applications, made by Albania, Austria, Bulgaria, Ceylon, Finland, Hungary, Ireland, Italy, Jordan, Korea, Mongolia, Nepal, Portugal and Rumania, have not been approved by the Security Council.

On December 2, 1949, the Acting President of the Court issued an order fixing January 24, 1950, as the date by which states should file their written statements on the question.

INTERNATIONAL STATUS OF SOUTH WEST AFRICA

On December 6, 1949, the General Assembly voted to request of the Court an advisory opinion on the following question:

What is the international status of the Territory of South West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular:

(a) Does the Union of South Africa continue to have international obligations under the Mandate for South West Africa and, if so, what are those obligations?

(b) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South West Africa?

(c) Has the Union of South Africa the competence to modify the international status of the Territory of South West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?

In transmitting the request, the Secretary General was directed to include among the accompanying documents, *inter alia*, Article 22 of the Covenant of the League of Nations, the Mandate confirmed by the Council of the League of Nations on December 17, 1920, documentation concerning the objectives and functions of the Mandates System, and the resolution concerning mandates adopted by the final Assembly of the League of Nations on April 18, 1946.

PROPOSED ACCESSION BY LIECHTENSTEIN TO THE COURT'S STATUTE

By a letter of March 8, 1949, transmitted to the Secretary General by the Swiss Office for Liaison with the United Nations, the Government of the Principality of Liechtenstein made inquiry as to the conditions on which Liechtenstein might become a party to the Court's Statute. A report by the Security Council's Committee of Experts⁵¹ recommended the same conditions as those previously established for Switzerland. Despite a contention that Liechtenstein was not a state, this recommendation was adopted by the Security Council on July 27, and it was approved by the General Assembly on December 1, 1949.

On March 22, 1939, Liechtenstein had made a declaration accepting the jurisdiction of the Court, complying with the resolution of the Council of the League of Nations of May 17, 1922, concerning the condition on which the Court should be open to a state not a Member of the League of Nations and not mentioned in the Annex to the Covenant; the jurisdiction of the Court under paragraph 2 of Article 36 of the Statute was also accepted for a period of five years.⁵² On May 9, 1939, Liechtenstein filed with the Registry of the Court an application in the *Gerliczy Case*,⁵³ which was subsequently discontinued.

RECOGNITION OF COMPULSORY JURISDICTION

Little progress was made during the year toward enlarging the list of states which have made declarations under Article 36 (2) of the Court's Statute, recognizing the compulsory jurisdiction of the Court. On March 1, 1949, the ratification of the French Republic's declaration of February 18, 1947, was deposited with the Secretariat of the United Nations.

The declarations made under Article 36 (2) of the Statute, by Belgium, France, Luxembourg, The Netherlands and the United Kingdom, are supplemented as between these states by a provision in Article 8 of their Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defense, signed at Brussels on March 17, 1948, and brought into force on August 25, 1948.⁵⁴ This article provides in part:

The High Contracting Parties will, while the present Treaty remains in force, settle all disputes falling within the scope of Article 36, paragraph 2, of the Statute of the International Court of Justice by referring them to the Court, subject only, in the case of each of them, to any reservation already made by that Party when accepting this clause for compulsory jurisdiction to the extent that that Party may maintain the reservation.

⁵¹ June 23, 1949, U. N. Doc. S/1342.

⁵² Hudson, *World Court Reports*, Vol. 4, p. 43.

⁵³ *Ibid.*, p. 495.

⁵⁴ *British Treaty Series*, No. 1 (1949), Cmd. 7599; this *JOURNAL*, Supp., Vol. 43 (1949), p. 59.

As the treaty is to remain in force for fifty years and thereafter until denounced, the shorter terms of duration fixed in the declarations by these states are to this extent prolonged, and during the prolonged period any fresh reservations which may be made by any of the named states will have no effect *inter se*.

On April 28, 1949, the General Assembly of the United Nations adopted the text of a Revised General Act for the Pacific Settlement of International Disputes, which adapts to present conditions the General Act adopted at Geneva on September 26, 1928.⁵⁵ On December 31, 1949, no state had become a signatory to the Revised General Act. The original General Act remains in force for some twenty states which became parties thereto,⁵⁶ and under Article 37 of the Court's Statute the jurisdiction conferred on the Permanent Court of International Justice is applicable to the International Court of Justice.

On December 2, 1949, the General Assembly approved and opened to signature a Convention for the suppression of the traffic in persons and of the exploitation of the prostitution of others, Article 22 of which provides:

If any dispute shall arise between the Parties to the present Convention relating to its interpretation or application and if such dispute cannot be settled by other means, the dispute shall, at the request of any one of the Parties to the dispute, be referred to the International Court of Justice.

It is difficult to determine the extent to which provisions for the Court's jurisdiction are being included in bipartite instruments. The following provision in Article 21 (2) of a Treaty of Friendship, Commerce and Economic Development, signed on behalf of the United States and Uruguay on November 23, 1949, might have been made more precise as to the method of submission:

Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy or other pacific means, shall be submitted to the International Court of Justice.

OFFICERS OF THE COURT

Article 9 of the Rules of Court provides that an election of the Court's President and Vice President shall be held

in the course of the month following the date on which the judges elected at the periodic election of members of the Court enter upon their duties.

That date fell on February 6, 1949.

On February 28, 1949, the Court elected Judge Basdevant as President, and Judge Guerrero as Vice President, for the ensuing three years.

⁵⁵ Hudson, *International Legislation*, Vol. 4, p. 2529.

⁵⁶ Spain denounced the Act on April 8, 1939.

THE COURT'S FINANCES

A devaluation of the Netherlands florin in terms of other currencies, which was effected in September, 1949, has created a peculiar problem for the Court. Article 32 of the Statute provides that "each member of the Court shall receive an annual salary," the amount of which is to be fixed by the General Assembly and "may not be decreased during the term of office." On February 6, 1946, the General Assembly fixed the judges' salaries at 54,000 Netherlands florins. Yet the budget of the United Nations is voted by the General Assembly in United States dollars.⁵⁷

The recent devaluation does not effect a decrease of the amount of florins payable to each judge as annual salary. It may result in an increase in cost of living while the judges are engaged at The Hague, however, and insofar as a judge spends part of his time in a country which has not effected a devaluation comparable to that of The Netherlands, he will find it impossible to purchase with florins as much of the currency of that country as he could have purchased previously. For some, if not most of the judges, therefore, there has resulted a serious decrease in the purchasing power of the salary paid in florins. The General Assembly was asked to provide relief from this situation by directing the payment of the salaries in dollars; while the request was received with some hospitality, no definite change was made.

The appropriation for the Court for 1950 amounts to \$634,765.

PUBLICATIONS OF THE COURT

No public institution in the world has been more thoroughly documented than the Court. The system of its publications, due to the genius of the first Registrar, Åke Hammarskjöld, was little changed during twenty years, but drastic changes have been effected since 1946.

The former Series A/B was transformed into *Reports*, appearing in annual volumes. The former Series C, which was extremely useful, has now been replaced by the publication of *Pleadings, Oral Arguments and Documents* for each case. While these volumes are admirably edited, they are somewhat difficult to cite; the short title, *I.C.J. Pleadings*, hardly suffices. It is not clear whether Series D has been continued. Series E has been transformed into annual *Yearbooks*.

The fly-leaf of some of the recent publications continues to bear the legend "All rights reserved by the International Court of Justice." This would seem to the writer to serve no useful purpose, and it does not operate to encourage reproduction of the materials contained in the documents. Encountering this problem when he issued the first volume of his *World Court Reports* in 1934, the writer felt it proper to obtain the Registrar's permission to reproduce the texts of the Court's judgments and

⁵⁷ See, for example, Resolution 252 (III), General Assembly, 3rd Sess., Pt. I, Official Records, Resolutions (U. N. Doc. A/810), pp. 151-155.

opinions, and he reluctantly accepted the conditions upon which the permission was granted. There being no copyright on its publications, the legend ought to be omitted; if any legend is retained, it ought to read "No rights are reserved by the International Court of Justice."

CONCLUSION

Almost four years have passed since the Court was reorganized for the resumption of its judicial activity in the changed international order. In this period it has had before it but one contested case; and it has handed down two advisory opinions. In these three cases it has functioned smoothly and efficiently, and significant contributions have been made to the Court's jurisprudence. This is hardly a satisfactory record of usefulness, however. Compared with the first four years of the Court, from 1922 to 1925, the record is somewhat disheartening; in that period the Court handed down judgments in four contested cases, it gave eleven advisory opinions, and in one case it declined to give an advisory opinion requested.

If the dearth of business before the Court were due to the absence of controversies between states, it would be welcome indeed. Yet there has probably never been a period in the history of the world which was marked by so much controversy as the past four years. One must search elsewhere for an explanation, therefore. Certainly states and the United Nations have not failed to resort to the Court because of any lack of confidence in its impartiality; there is general satisfaction with its Statute, the Bench is notably competent, the rules of the Court have evoked no protest, and the procedure in actual cases has given rise to no difficulties. It would be an over-simplification to set down any single reason for the failure of governments and the United Nations to seek more of the Court's assistance. Perhaps one may say, however, that in a period following a devastating world war there is likely to be less inclination on the part of powerful states to seek solution of differences along judicial lines, and less powerful states find themselves so embroiled in political complications that they, too, find themselves reluctant to resort to judicial proceedings.

No improvement of this situation can be effected by artificial attempts to stimulate the use of the Court. The resolution adopted by the General Assembly of the United Nations on November 14, 1947, demonstrated the futility of such measures. If and when more frequent resort to the Court comes about, it will probably be because of more intensified respect for law and its rôle in international affairs.

The fact that proceedings in six new cases have been instituted in 1949 is a happy augury for the immediate future. It is to be noted that in addition to the nine specialized agencies which have been authorized to address requests to the Court for advisory opinions, the Interim Committee of the General Assembly, reestablished as "a subsidiary organ" by the latter's resolution of November 21, 1949, has also been authorized to request advisory opinions on legal questions arising within the scope of its activities.

TOWARDS AN INTERNATIONAL CRIMINAL COURT

BY PROFESSOR VESPASIAN V. PELLA

President of the International Association of Penal Law

The United Nations General Assembly on December 9, 1948, adopted a resolution reciting that "in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law," and therefore inviting the International Law Commission to study the desirability and possibility of establishing such a judicial organ, in particular as "a Criminal Chamber of the International Court of Justice."¹ Further, in approving the Universal Declaration of Human Rights on December 10, 1948, the General Assembly endorsed a principle of the greatest import for the codification of international criminal law: that of *nullum crimen sine lege, nulla poena sine lege*. For Article 11 (2) of the Declaration provides that:

No one shall be held guilty of any penal offence, on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.²

Twenty-four years before, representatives of 41 parliaments assembled in conference, took the same standpoint in recognizing the need for a draft penal code of nations.³ In the annex to the resolution of the Conference of the Interparliamentary Union of October, 1925, which the present writer drafted in his capacity as *rapporteur* of the conference, it was likewise

¹ See the report (*Rapporteur*, Mr. J. Spiropoulos) of the Sixth Committee of the General Assembly, U. N. Doc. A/760, Dec. 5, 1948.

² The amendments leading to the final text quoted above were proposed by the French representative, Professor René Cassin. See U. N. Docs. A/C.3/244/Rev.1, Oct. 12, 1948, and A/C.3/SR.116, Oct. 30, 1948. It is submitted that Art. 11 of the Declaration has affirmed the validity in international law of a fundamental principle of juridical security which in domestic law has been recognized not only in many criminal codes or legislative acts but also in the constitutions of some states. On the principle *nulla poena sine lege* in international law, see V. V. Pella, *La Guerre-crime et les Criminels de Guerre*, pp. 68-108. A clause similar to that of Art. 11 of the Declaration has been inserted in the Draft International Covenant on Human Rights prepared by the Committee of Human Rights of the United Nations, May-June, 1949. See U. N. Doc. E/CN.4/332/Add.2. June 18, 1949.

³ See report of the 23rd Interparliamentary Conference, p. 798.

suggested that a criminal chamber should be created within the Permanent Court of International Justice for the trial of individuals accused of international crimes and offenses. And it was there advocated also that international offenses, and the sanctions therefor, should be defined in advance in precise texts; in other words, that the principle *nulla poena sine lege* should be the basis of international repression of crime.

If, in 1925, the Washington Conference of the Interparliamentary Union did no more than give concrete form to ideas of statesmen and lawyers born of bitter experience during the first World War,⁴ it must be recognized that, in spite of the efforts of non-governmental organizations,⁵ the governments did almost nothing between the two wars to bring about an international system of criminal justice. On the official level, the only important development was the conclusion of the general convention of November 16, 1937, for the setting up of an international penal court. This convention, which was signed only by thirteen states, amongst them France and the U.S.S.R., never came into force because of events leading up to the outbreak of the second World War. Moreover, its application

⁴ The insignificant result of the Treaty of Versailles insofar as concerns criminal responsibility in the international sphere is well known. The former German Emperor was declared by Art. 227 guilty of supreme offenses against international morality and the sanctity of treaties, but he was never tried or punished. The repression of war crimes provided for in Arts. 228 and 229 proved to be trivial in practice. Out of 896 persons figuring on the first list of the Allies, the German Court of Leipzig condemned only 6. As to the preparatory work of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, see its Report in this JOURNAL, Vol. 14 (1920), pp. 95-154. The work of the Advisory Committee of Jurists created in February, 1920, by the Council of the League of Nations was no more profitable. The League of Nations did not give any consideration to the so-called Descamps Draft for the creation of a high court of offenses against international public order and the universal law of nations. The Assembly, in adopting in 1920 the report of the Third Committee, deemed that the question of an international criminal court was not ripe and meanwhile the Council decided in conformity with a report by Mr. Caclamanos, that the problem should be first studied by some international organization. See Manley O. Hudson, "The proposed International Criminal Court," this JOURNAL, Vol. 32 (July, 1938), pp. 549-551, and Quintiliano Saldana, "*La Justice criminelle internationale*," in Acts of the First International Congress of Penal Law, pp. 377-383.

⁵ Aside from the text of the "Fundamental Principles of a Penal Code of Nations," annexed to the resolution adopted in 1925 in Washington by the Conference of the Interparliamentary Union, attention must be called to the draft Statute of an International Criminal Court adopted by the 34th Conference of the International Law Association (Vienna, 1926), Report, pp. 130-142, on the basis of texts by Professor H. Bellot; and the draft Statute of an International Criminal Court prepared by the International Association of Penal Law on the basis of the writer's draft, *Revue internationale de Droit pénal*, 1928, No. 3, pp. 293 ff. In 1935 the same review (pp. 348 ff.), published the Plan for a World Criminal Code drafted by the present writer to serve as a basis for the work of the International Law Association, of the Interparliamentary Union and of the International Association of Penal Law. The text of this Plan was reproduced in English in the *Revue internationale de Droit pénal*, 1946, Nos. 3-4, pp. 248-262.

was limited to the case of terrorism, was optional and contemplated the criminal responsibility of individuals only. Nevertheless, it marked a decisive turning-point in the history of contemporary public law. For the first time the regular rendition of international judgments in criminal cases was contemplated, and that corollary of the dogma of sovereignty, the doctrine that such cases belong exclusively to national courts, abandoned. Even today that convention⁶ would be a useful working document in connection with the drafting of the constitution of an international criminal court. As Professor Manley O. Hudson, in a remarkably prophetic article, wrote in this JOURNAL in 1938:

Whether the convention should be brought into force or not, whether if it is brought into force the court as therein envisaged be created or not, certain ideas underlying the convention will certainly attract interest in the future and they may have influence in the further development of international legislation.⁷

The hesitation, even the contradictions, observable in the attitudes of governments between the two wars towards the question of setting up an international criminal court, are, however, not altogether inexplicable. As Nicolas Politis noted, an innovation of this sort runs counter to inveterate secular habits. It confronts the formidable obstacle which the dogma of sovereignty constitutes.⁸ And, further, some allegedly legal

⁶ Regarding the origins of this convention it must be recalled that after the assassination on Oct. 9, 1934, of King Alexander of Yugoslavia and M. Barthou, the French Government proposed the creation of an international criminal court together with a convention for the international repression of terrorism. The text of the Convention of November 16, 1937, followed a first draft drawn up by the writer and presented in May, 1935, to the first session of the League of Nations Committee for the International Repression of Terrorism. This draft was submitted to the governments as a proposal of the Belgian, French, Rumanian and Spanish members of said Committee. It was then adopted by the Committee at its Second Session in January, 1936. After submission to the ordinary session of the Assembly of the League of Nations in October, 1936, and revision at the third session of the Committee in April, 1937, it was adopted with little change by the Intergovernmental Conference that met in Geneva, Nov. 1-16, 1937, with Count H. Carton de Wiart as President. See Sasserath, *Revue belge de Droit pénal et de Criminologie*, November, 1937; Caloyanni, "*Deux conventions: prévention et répression du terrorisme, création d'une cour pénale internationale*," *Revue de Science criminelle et de Droit pénal comparé*, July-Sept., 1938; H. Donnedieu de Vabres, "*La Répression du terrorisme*," *Revue de Droit international et de Législation comparée*, 1938, pp. 37 ff.; Bouzat, *Chronique, Revue de Science criminelle*, July-Sept., 1938, pp. 563 ff.; Sottile, "*Compétence de la Cour pénale internationale*," in *Le Terrorisme international* (Paris, Sirey), pp. 86 ff.; also V. V. Pella, "*La Cour pénale internationale et la répression du Terrorisme*," *Union belge de Droit pénal*, Brussels, 1938.

⁷ See Manley O. Hudson, "The Proposed International Criminal Court," this JOURNAL, Vol. 32 (1938), p. 554; Philip C. Jessup, *A Modern Law of Nations*, p. 179.

⁸ See Politis, *Rapport sur l'institution d'une juridiction criminelle internationale*, Acts of the First International Congress of Penal Law, p. 413. Referring to the Great Powers of the European Axis, a French jurist averred that the organization of an

arguments have been advanced in opposition to it. Thus it has been argued that, states being alone subjects of international law and that law being concerned with the acts of sovereign states⁹ alone, an international criminal jurisdiction is inconceivable because the state as such cannot be a subject of criminal law and cannot be held criminally responsible. Individuals alone being subjects of criminal law—so the argument runs—and international law prescribing no sanctions for individual offenders, these last cannot be subjected to an international jurisdiction.

It is submitted, however, that the doctrine of the criminal irresponsibility of the state, though still having numerous adherents, particularly amongst internationalists, does not reflect the reality of the law of today. It is also not to be denied that the setting up of an international court for the trial of individuals charged with violation of international law would be wholly consonant with the dictates of juridical conscience. Even after the first World War the Treaty of Versailles recognized that the violation of international law could give rise to individual responsibility. And the second World War has revealed types of criminality offending the sentiments of the entire world and widening further the horizons of international criminal law. Mr. George A. Finch has, in this JOURNAL, well described these terrible aspects of criminality which emerge when it is the purpose and act of an aggressor "to reduce large masses of conquered populations to permanent subjection and to exterminate others, including his own, whom he cannot assimilate into his so-called racial and ideological new order," as having "resulted in an orgy of inhuman brutalities on a scale unprecedented in previous wars, not only in flagrant violation of universally accepted laws of war, but which have also, in President Roosevelt's words, violated every tenet of the Christian faith."¹⁰ All these

international penal justice was difficult to conceive in presence of "a totalitarianism triumphing precisely in the States susceptible of becoming those aggressors which were intended to be subjected to an international criminal justice by the new penal law; and the notion of a totalitarian state represents a kind of hypertrophy of the old theory of sovereignty which, even in democratic countries, does not permit the foundation of an international jurisdiction on anything better than a contractual agreement freely accepted and easily attachable." See Marc Ancel, in *Revue de Science criminelle et de Droit pénal comparé* (1946), Nos. 2-3, p. 330.

⁹ This exclusive conception had been in dispute for many years. See the valuable "Survey of International Law in Relation to the Work of Codification of the International Law Commission," U. N. Doc. A/CN.4/1/Rev.1, Feb. 10, 1949, pp. 19-22.

¹⁰ See George A. Finch, "Retribution for War Crimes," this JOURNAL, Volume 37 (1943), p. 81. The charters for the organization of the International Military Tribunals of Nürnberg and Tokyo must be looked at in the light of the experience of the second World War. The same with some drafts such as those of the London International Assembly and of the United Nations War Crimes Commission. Mention must also be made of the fact that in 1944 Professor Hans Kelsen published in the annex to his book, *Peace Through Law*, a draft under the title of "Treaty Stipulations establishing individual responsibility for violations of international law" (international criminal jurisdiction). In May, 1947, following a resolution of the Economic and Social Council,

crimes—crimes of an enormity unprecedented by reason of the vast numbers of the victims and the capacity for evil of the actors, crimes of a gravity never before equaled because committed by the possessors of the sovereignty of states—have been recognized and the criminal responsibility of their authors brought home by the charters of the tribunals which sat at Nürnberg and at Tokyo and by the judgments of these last.

But, for the repression of such crimes in the most effective manner, the setting up of a new permanent international criminal court is called for. Such would be in accord with the contemporary urge to “bring international law up to date”—to borrow an expression from the report of the Secretary General to the General Assembly of the United Nations, dated October 24, 1946. It is this urge which has led the authorities of numerous countries, amongst them France and the United States,¹¹ to seek and to achieve the reaffirmation of the principles of the Charter and Judgment of the Nürnberg Tribunal by the United Nations, and the conclusion

the Secretary General of the United Nations prepared a draft convention on genocide with the assistance of three experts on international and criminal law, Professors Donnedieu de Vabres, Lemkin and the writer. Two of them considered that a permanent international criminal court was desirable. An agreement was reached on the basis of presenting two alternative drafts to the United Nations, one aiming at the creation of a permanent international criminal court, the other at the creation of an *ad hoc* international criminal court. Two drafts prepared by the present writer for this purpose, closely followed the Convention of 1937 for the Creation of an International Criminal Court. These texts, with alterations, were adopted by the other two experts, and appeared as Annexes 1 and 2 of the Draft Convention on Genocide prepared by the Secretary General. See U. N. Doc. E/447, June 26, 1947, with excellent introductory remarks by Professor Emile Giraud. In 1948 the *Commission française du droit commun international*, on the basis of texts drawn up by Procureur General Boissarie, prepared a draft statute for an international criminal court called upon to insure the repression of crimes against humanity. See *Revue internationale de Droit pénal*, 1948, pp. 385 ff.

¹¹ The resolution of Dec. 11, 1946, adopted unanimously by the General Assembly, originated in a famous letter from President Truman in reply to the Report of Nov. 9, 1947, of the American Judge to the International Military Tribunal of Nürnberg. See Francis Biddle, “The Nürnberg Trial,” *Proceedings of the American Philosophical Society*, Vol. 91, No. 3 (August, 1937), p. 296. In the United Nations Committee for the Progressive Development of International Law and its Codification, Professor Donnedieu de Vabres was the most active supporter of the new tendencies. (See his memorandum presented on the creation of an International Criminal Jurisdiction, Doc. A/AC.10/21, May 15, 1947, and, on proposals concerning the principles of the Charter and Judgment of Nürnberg, U. N. Doc. A/AC.10/34, May 27, 1947.) In the same Committee Professor Philip C. Jessup delivered a statement in which, after admitting that the Committee had to deal with methods and was not charged with the actual formulation of the Nürnberg rules or principles, he nevertheless recognized that in view of the importance of the proposals of the French Delegation as to an International Criminal Court, “the report of the Committee should contain special mention of this subject and should recommend that the attention of the Commission of Experts be called thereto.” U. N. Doc. A/AC.10/36, May 23, 1947, pp. 4-5.

of conventions for the repression of international crimes such as genocide,¹² capable of commission in war and peace alike.

THE NEED FOR AN INTERNATIONAL CRIMINAL COURT

Two resolutions of the United Nations General Assembly have referred the question of an international criminal jurisdiction to the International Law Commission. These are, first, the resolution of December 9, 1948, adopted as a corollary of the Convention on Genocide;¹³ and, secondly, that of November 21, 1947, adopted with a view to the achievement of a more precise formulation of the principles of international law recognized in the Charter and Judgment of the Nürnberg Tribunal.¹⁴ The first of these, it is understood, has now to be read in the light of Article 6 of the Genocide Convention, the final paragraph of which was adopted by the Sixth Committee subsequently to this resolution. The position is that, the article in question expressly recognizing the right of the contracting parties to prosecute persons accused of genocide before an international court, the thesis that such a court is not a practical proposition and that the formulation of plans for its creation ought not, therefore, to be undertaken, falls to the ground—at least insofar as concerns genocide. For

¹² As early as Sept. 30, 1947, in a communication to the Secretary General, the U. S. Government had proposed a text inviting the Parties to the Convention on Genocide to take "steps, through negotiation or otherwise, looking to the establishment of a permanent international penal tribunal, having jurisdiction to deal with offenses under this Convention." See U. N. Doc. A/401/Add.2 (English), Oct. 18, 1947, Art. VII, pp. 19-20. The creation of an international criminal jurisdiction was supported by the representatives of France and the United States in the special committee on genocide which met at Lake Success, May 5-10, 1948, with Mr. John Maktos as Chairman. The statements by the Chairman as representative of the United States, and by Mr. Pierre Ordonneau, delegate of France, were particularly interesting. Further, Mr. Maktos presented a proposal contemplating the jurisdiction of an International Criminal Court in the case where the state on whose territory genocide was committed did not take the proper measures for its punishment. See Report of the Special Committee on Genocide, U. N. Doc. E/794, May 26, 1948. When the Economic and Social Council at its Seventh Session in Geneva, July 19-Aug. 29, 1948, discussed the draft and the report of the Special Committee, the delegates of France and the United States emphasized the need for the creation of an International Criminal Court. The representative of the United States, Mr. Thorp, said that the establishment of an international tribunal would constitute a new and significant step in international law. Finally, the delegates of the United States and France to the General Assembly insisted on the inclusion in the Convention of a clause defining the jurisdiction of the International Criminal Court in cases of genocide. See report of the Sixth Committee, U. N. Doc. A/760, Dec. 5, 1948, and Summary Records of its meetings, U. N. Docs. A/C.6/SR.93, 95, 98, 99, 130 and 180.

¹³ See U. N. Doc. A/760, p. 13.

¹⁴ See resolution No. 177 (II), General Assembly, Official Documents, 2nd Sess. On the formulation of Nürnberg principles and all questions connected with this formulation, see a comprehensive and fully documented study by Yuen-li Liang, "The General Assembly and the Progressive Development and Codification of International Law," this JOURNAL, Vol. 42 (1948), at pp. 91-93.

parties to the Convention willing to admit the jurisdiction of an international criminal court could properly call for the implementation of Article 6, an article adopted unanimously by the General Assembly along with the rest of the Convention, and giving them the express right to call upon such a court.

As to the resolution on the formulation of the Nürnberg principles, though this does not in terms mention an international criminal court, it is difficult to see how the principles in question can have any importance in the future, or how their future application can be assured, unless such a court be created. The Charter applied at Nürnberg itself set up an international tribunal and its judgment is not, of course, similar to that of any national court. It is indeed argued that special circumstances attended the creation and functioning of that tribunal, but this has no relevance to the future. If, as is also argued, the *laws of war* applied exclusively in that case, then it may be conceded that the Allied Powers could punish every war criminal wheresoever found either by right of capture or in consequence of the occupation of Germany. Or if, as has been said, in creating the Tribunal the occupying Powers merely "did together what each one of them could have done alone," or, in other words, confided their several jurisdictional powers to a single court, it is to be noted that the same sort of evolution is observable in other fields. For it is a commonplace that no international organization can exist or function if the states setting it up give it none of their own powers. But it is no less clear that, by so combining their several jurisdictional powers, the states concerned inevitably set up a superior judicial order. The judgment of a British military tribunal, sitting in the British occupation zone, has not, it can immediately be seen, the same authority for the United States, the U.S.S.R. or France as the judgment of the Nürnberg Tribunal. The latter possessed powers over each of the states setting it up; its decisions were taken by majority vote, or in virtue of the casting vote of the President in case of equal division. A state whose judge dissented was bound to recognize the validity of its decisions. It thus was a veritable international institution whose decisions were binding upon the states comprising it. And the mere fact that it was established *ad hoc* by the states occupying Germany and staffed by judges nominated by them in no way detracted from its character as such an institution. It is noteworthy that the Nürnberg Tribunal was not only the creature of the will of these four Powers. In virtue of Article 5 of the Agreement the following governments adhered: Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, The Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia. Therefore this tribunal can be considered as an international criminal tribunal of the United Nations.

The United Nations Committee on the Progressive Development of International Law and its Codification, which met at Lake Success from May 12 to June 17, 1947, decided by a majority to state in its report that:

the implementation of the principles of the Nürnberg Tribunal and its judgment, as well as the punishment of other international crimes which may be recognized as such by international multipartite conventions, may render desirable the existence of an international judicial authority to exercise jurisdiction over such crimes.¹⁵

It is understood that, when the General Assembly charged the International Law Commission with the formulation of the principles of international law enshrined in the Charter and Judgment of the Nürnberg Tribunal, it did not intend merely to institute an academic inquiry. For what is eminently necessary, and what the General Assembly surely ought to have had in mind, was the taking of some practical step. And it is impossible to envisage an international justice in this sphere without a judicial organ also of an international character.

To formulate the relevant principles of international law without contemplating a judicial organ to apply them would be merely to formulate principles which only victors may, by right of the *law of war*, cause to prevail. Were that the case, such principles would apply or not apply according to the varying fortunes of war. It is apparent that the vicious circle into which things have got must be broken at all costs. It must be recognized that, given the mandate of the International Law Commission to draw up a code of crimes against the peace and security of mankind, it is quite academic at the present time whether or not any particular principle in the Charter or the Judgment of the Nürnberg Tribunal is recognized as international law. What is in question is a work of construction, for the purposes of which there is needed an estimate of the fundamental requirements of the international order. Thus any act whatsoever calculated seriously to disturb the peaceful relations of states, should be regarded as a crime against the peace and security of mankind. Equally there is need for a serious estimate as to what will be the precise value or utility of the Nürnberg principles, duly formulated and placed in their proper context in an international criminal code, in the absence of a judicial organ to apply them. The answer here is clear. Without such an organ, those principles, and the greater part of the provisions of the code, would be perverted for the purpose of disguising the mien of vengeance as the mask of justice. They would be relied on by victor against vanquished. Victors would claim that they were applying a law laid down in advance by the United Nations. Without an international criminal court, justice would rest only on the victory of the victims of unjust attack—but even in that event it is to be doubted whether the tribunals they

¹⁵ See U. N. Doc. A/332, July 21, 1947.

themselves set up could be truly impartial.¹⁶ The convicted would always consider themselves as convicted on the basis of defeat, not of guilt.

Furthermore, what has many times been said never ceases to be true: that crime, innocence, necessity, even justice, have different names, meanings and colors on the two opposite sides of the barricades. National jurisdictions, be they those of victor or vanquished, cannot decide with the necessary detachment where the duty of the accused to their fatherland begins and ends, when this duty is opposed either to the consciences of the accused themselves or to the dictates of international law.

The experiment of Nürnberg and Tokyo as well as new eventual international regulations open, on the other hand, large possibilities for the creation of an international criminal court. Mr. Arthur K. Kuhn stated with good reason in this JOURNAL that two events may direct the evolutionary process in the direction of the creation of such a jurisdiction:

The first is the fact that the procedure of the Nuremberg Tribunal gave satisfaction to the allied participants as measured by the various standards of their systems of jurisprudence. The other influence is the realization on the part of the United Nations of the necessity for the control by law of all methods of mass destruction. The recognition of this has been manifested by all as an essential of self preservation.¹⁷

There are many other cases in which the repression of crimes upon a national basis does not suffice. Either the nature of the offense itself, or the identity of the author, permits, in such cases, either inadequate repression, or complete impunity, or the prejudice of good international relations. For instance, it is difficult to see how the courts of a state can effectively prevent the abusive exercise of the sovereignty of that state. For, insofar as concerns natural persons, such as heads of states, rulers and officials guilty of international crimes, their trial by the courts of their own states is in general possible only where a collapse of régime follows a lost war or a revolution. And the alternative solution of giving jurisdiction to the courts of any state directly injured by such crimes is open to the objection that these last can rarely escape suspicion of partiality. Professor Jules Basdevant, now President of the International Court of Justice, saw the case in exactly the same way when in 1937 he was concerned to show the necessity for an international criminal court for the trial especially of terrorists. Speaking of national courts, he said:

¹⁶ See P. Bouzat, "*Considérations sur une communication concernant les fonctions pacificatrices du droit pénal supranational*," *Revue internationale de Droit pénal*, 1948, p. 64.

¹⁷ See editorial comment, "International Criminal Jurisdiction," this JOURNAL, Vol. 41 (1947), p. 433. Mention must be made that in the searching article "The Law of the Nuremberg Trial," Mr. Quincy Wright also states that the trial of Nürnberg has "manifested the practicability of a fair trial of war crimes in an international tribunal, and may encourage the establishment of a permanent tribunal with a wider jurisdiction for the trial of such crimes and other offenses against the law of nations not dealt with by national tribunals." See this JOURNAL, Vol. 41 (1947), p. 42.

The way in which these courts operate, the way in which they investigate possibly complicated facts the evidence for which is perhaps dubious, and the way in which they give judgment may vary from country to country. And political tension between the country affected by a terroristic crime and that wherein it is tried may result from the decision reached by the court concerned and the manner in which it reaches it. It is precisely in cases of this kind that it would be useful, for the good understanding of nations, to submit the offense to the jurisdiction of judges whose impartiality and independence are unquestionable.¹⁸

And the same argument, of course, applies to numerous other crimes of an international character committed in time of peace and involving the responsibility, be it only the civil responsibility, of states themselves by reason of the surrounding circumstances.

It has, however, been contended that the operation of an international criminal court would violate the *principle of territoriality* of criminal law and would involve no less serious prejudice to the sovereignty of states. But if these considerations have any weight, they ought equally to exclude various other principles which have become firmly embodied in the law of today. For numerous systems of law admit the so-called *principle of active personality* by virtue of which the criminal law of a state extends to its subjects committing offenses abroad. Some states also apply the *principle of passive personality* and extend the protection of their criminal law to their subjects injured by offenses committed abroad. The *principle of real protection*—according to which the state applies its own law for the protection of certain of its interests, whatsoever the *lex loci delicti commissi* or the nationality of the accused may be—is likewise not to be forgotten. Finally, some systems of law admit the *principle of universality* in case of offenses committed by aliens abroad regarded as prejudicing the interests of all nations.

Whilst, therefore, the primacy of the principle of territoriality in many cases must be conceded, it is indubitable that often territorial jurisdiction is insufficient. That principle has no absolute value and cannot be adduced to exclude all possibility of establishing an international criminal jurisdiction. And, by the same token, the objection that such a jurisdiction would do violence to the principle of sovereignty can be met by pointing out the deep inroads into that principle which have already been made in shaping the organization of the international community which now exists. If the doctrine of absolute sovereignty be accepted, clearly national courts must apply not only their own domestic law, but also their own conception of international law. In the face of such a scheme, any discussion of the place of an international criminal court is meaningless. But if, on the contrary, the principle of the reciprocal limitation of indi-

¹⁸ See Judge Basdevant's declaration in Acts of the Conference for the Repression of Terrorism, League of Nations Doc. C.94.M.47.1938.V., p. 59.

vidual sovereignties in the interest of the organization of peace—a principle recognized by all Members of the United Nations, as their very presence within that organization shows—if that principle be admitted, and if the view be taken that states must adjust their sovereignty to the mould of international law, then it follows that they may set up an international criminal court,¹⁹ that is to say, a court charged precisely with the determination of acts committed in improper exercise of sovereignty so conceived. Numerous conferences held since the last World War have agreed without any hesitation upon the necessity of an international criminal court. It is felt that the main thought which emanates from most of the work accomplished at these conferences could not be expressed in clearer terms than those used by Professor Jean Graven:

As long as there is no judicial organ for the trial of international crimes, there will be neither a serious codification of international criminal law nor any serious application of an international sanction. The world will go on living in a judicial anarchy under violence and injustice with the risk of running into destruction.²⁰

¹⁹ This jurisdiction will be able to coöperate in the development of international law and in the defense by means of international law of some vital legal rights now under the protection of the United Nations. Dr. Ivan Kerno said that a special responsibility rests on the International Court of Justice "when questions of international law are referred to it, and on the whole body of international lawyers throughout the world, to interpret and apply fairly and impartially, recognized rules of international law, so as, in the words of our Charter, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." See Proceedings of the First Conference of the International Bar Association, New York City, October, 1947. It is thought that similar considerations call for an international criminal jurisdiction and for the coöperation of all jurists learned in international criminal law.

²⁰ See "*La Jurisdiction Pénale internationale*," in *Revue de Droit international* (Sottile), 1948, No. 1, p. 30. It must be remembered that the *Congrès international du mouvement national judiciaire français* was composed of jurists from 22 countries, including France, the U.S.S.R., the U. K. and the U. S., which met in Paris, Oct. 24-27, 1946, and unanimously adopted a resolution recommending that "the punishment of crimes against humanity should be provided for in an international code and that an international criminal jurisdiction should be set up as soon as possible." See *Revue internationale de Droit pénal*, 1948, Nos. 3-4, p. 384. The International Permanent Committee for the Study of the Punishment of Crimes against the Law of Nations, which met in Luxembourg May 14-16, 1947, recognized that "the diversity of the methods of repression in various countries responsible for the prosecution of war crimes under domestic law makes it clear that it would be desirable to now assign the trial of war criminals to a permanent international criminal jurisdiction, where not only judges from the countries victims of the aggression would sit, but also judges from neutral countries and even perhaps from the countries of which the accused are nationals." See *Revue de Droit pénal et de Criminologie*, 1948, No. 9, p. 826. The 8th International Conference for the Unification of Penal Law, held in Brussels, July 10-12, 1947, adopted a resolution recommending that the punishment of crimes against humanity "should be organized on an international level and ensured through an international criminal jurisdiction, whenever the delinquents are governing officers, organs of the State or

SUBSTANTIVE LAW AND ITS CODIFICATION

It is of the greatest importance to know whether the functioning of an international criminal court requires the laying down of rules respecting, first, the general principles of repression of offenses within its purview and, secondly, the definition of such offenses and of the penalties therefor. International penal law, as hitherto understood, has been treated as a branch conforming to the generality of international law insofar as its development is concerned. International law, as Mr. Henry L. Stimson has aptly observed (*Foreign Affairs*, January, 1947), is "not a body of authoritative codes or statutes; it is the gradual expression, case by case, of the moral judgments of the civilized world." The present writer has discussed this circumstance at length elsewhere in the context of his thesis that the principle *nulla poena sine lege* had no application in the Nürnberg and Tokyo trials. Here he is concerned merely to inquire why today, when what is to be done is to be done for the future, that same principle should be ignored in the new field of international criminal law—a law which, for the very reason that it is new, cannot become part of the conscience of the world unless it offers every safeguard against abuse and arbitrary action.

When the General Assembly of the United Nations, by its Resolution of December 11, 1946, reaffirmed the Nürnberg principles and decided to

protected by a State and also when the punishment on a domestic level is failing." See Acts of the Conference, p. 288. The 5th International Congress of Penal Law held in Geneva July 28–31, 1947, also called for the creation of "a permanent international jurisdiction to decide conflicts of jurisdiction in penal matters either positive or negative and to take cognizance in particular of crimes against peace, of war crimes and of crimes against humanity." See *Revue internationale de Droit pénal*, 1948, Nos. 3–4, p. 410. In a communication to the United Nations, the World Federation of United Nations Associations recommended that "an international criminal tribunal be set up to try cases of genocide." See U. N. Doc. A/C.2/81, March 1, 1948. The 2nd Conference of the International Bar Association, held at The Hague, Aug. 16–21, 1948, submitted to its symposium on international penal law, the question of the procedure to be applied for the arrest, trial, judgment and punishment of persons charged with offenses under international criminal law. The symposium unanimously voted a resolution calling for the creation of an international criminal jurisdiction. See *Revue de Droit pénal et de Criminologie*, 1948, No. 1, pp. 58, 59. The International Conference of the Red Cross held in Stockholm, Aug. 20–30, 1948, by its resolution 23 directed the International Committee of the Red Cross to proceed in its work on the question of punishment for violations of humanitarian conventions. The Committee drafted a variety of projects which, *inter alia*, contemplated the possibility of an international court to take cognizance of such crimes. The 37th Interparliamentary Conference which met in Rome Sept. 6–11, 1948, in a unanimous resolution stated that "the collectivity of States must adopt as soon as possible an international criminal code and create an international criminal court for the punishment of crimes against peace, war crimes and crimes against humanity, including in particular the crime of genocide." This resolution was communicated to the United Nations. See U. N. Doc. A/C.3/221, Oct. 5, 1948.

treat "as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal," that body thereby recognized that international criminal law ought no longer to retain the customary character it has hitherto had. And, as has been pointed out already, Article 11 (2) of the Universal Declaration of Human Rights has endorsed, as respects the international sphere of law, the principle *nullum crimen sine lege, nulla poena sine lege*.

It is not to be ignored, either, that the Universal Declaration of Human Rights forbids irregular penalties as well as irregular arraignments.²¹ It would follow from the prohibition by that instrument of penalties greater than those already prescribed at the time of commission of any given offense that no prosecution will lie in respect of acts for which no penalty is yet prescribed when they are committed. But it is not to be denied that, insofar as concerns the gravest offense contemplated by the charters applied by the International Military Tribunals, that is to say, crimes against the peace, neither international nor national law as yet prescribes a penalty therefor. On the model of certain national political tribunals, the Nürnberg and Tokyo Tribunals were endowed by their charters with power to impose whatsoever penalty that appeared to the judges to be just. This power, however, exists no longer, having been given solely in relation to the cases of the major war criminals of the Powers of the European Axis and of the Far East. The charters looked to the past, not the future. And it is for this reason, as has been said already, that the United Nations General Assembly has reaffirmed the Nürnberg principles and, in order to endow them with a permanent and universal value, has called for their formulation by the International Law Commission.

In order to give effect to Article 11 of the Universal Declaration of Human Rights, it will be necessary in the future to provide (as the Charters of the Nürnberg and Tokyo Tribunals did not provide, but, whilst binding the court as to the crimes charged, left it free in the matter of penalties) either for the prescription in advance of the penalties to be imposed by

²¹ The importance of a codification of substantive law was also recognized at the meeting of May 24, 1949, of the International Law Commission. Following a statement by Mr. Roberto Cordova concerning the need for making charges precise, Mr. A. E. F. Sandström urged that all questions connected with the principle *nullum crimen sine lege* should be resolved, "in view of the fact that the Commission was called upon to prepare a draft code of crimes against the peace and security of mankind which would contain a list and definition of such crimes." See U. N. Doc. A/CN.4/SR.26, p. 7. The International Bar Association on Aug. 6, 1949, set up a committee for the study of a draft code of crimes against peace and security of mankind and that to insure the functioning of a permanent jurisdiction whose creation was contemplated by the 2nd Conference of the International Bar Association at The Hague, 1948, as fundamental for the maintenance of peace.

the international criminal jurisdiction in the same manner as penalties are prescribed in national criminal codes; or for a system of incorporation,²² whereby the penalties prescribed for given offenses by given systems of national law are made applicable. As to the latter alternative, it is believed that it is possible to avoid the practical difficulties of such a scheme as that advocated by Nicolas Politis. This called for the giving to the international court of texts "defining precisely criminal acts, fixing penalties, and indicating the manner of application and execution of the latter, which would presuppose the prior conclusion of one or more international agreements."²³

JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

In the printed version of his course of lectures at Columbia University, Nicolas Politis took the position that, before deciding how an international criminal court could be set up, it would be desirable to conduct an inquiry into the different theories of international criminal responsibility.²⁴ In support of the same thesis he said in his report to the First International Congress for Penal Law held at Brussels in 1926:

Three theories exist: that of the exclusive responsibility of States which Professor Donnedieu de Vabres supports; that of the cumulative responsibility of States and individuals [elaborated by the present writer], and that of the exclusive responsibility of individuals, advocated by Lord Phillimore in the Committee of Jurists in 1920.²⁵

²² Crimes against the peace might be assimilated to murder for purposes of applying domestic law. On the choice of the applicable law, see, for instance, Art. 17 of the draft for an international criminal court established by the Committee of Experts of the League of Nations, Doc. C. 222. M. 162. 1937, and Art. 21 of the Convention for the Creation of an International Criminal Court, League of Nations Doc. C. 94. M.47. 1938. V. Following the same consideration on the legality of the punishment, *nulla poena sine lege*, Mr. Ricardo Alfaro proposed on May 26, 1949, to the International Law Commission "to establish at least the maximum sentence for criminals in the formulation of the principles." See U. N. Doc. A/CN.4/SR.28, p. 14.

²³ See N. Politis, *Les Nouvelles Tendances du Droit international*, p. 135. Starting from a different point of view and without referring to an international criminal court, Mr. Vladimir Koretsky proposed at the meeting of the International Law Commission of May 26, 1949, that any person committing acts which constitute crimes under international law should be held responsible for such acts, subject to the existence of appropriate international agreements, whether or not the acts in question constitute crimes under the domestic law of the country on whose territory they had been committed. See U. N. Doc. A/CN.4/SR.25, p. 17.

²⁴ See N. Politis, *op. cit.*, Ch. III: *Le Droit pénal international*.

²⁵ See N. Politis, *Acts of the Congress*, p. 418. It is noteworthy that Professor Donnedieu de Vabres did not intend always to exclude individual responsibilities before an international court. In his various works he has recognized the need for trying rulers accused of international crimes in an international court. See, in particular, *Principes modernes du Droit pénal international*, p. 417; *Traité de Droit criminel*, pp. 1036 ff.; *Cours de Droit criminel approfondi*, pp. 89 ff.

The second theory mentioned, that of cumulative responsibility, which was endorsed by the congress of 1926, is thought to be the only one adequate for the effective protection of peace by penal sanctions.

1. *Responsibility of States*

There is no need to labor here the thesis that the state can have criminal responsibility. It has been elaborated in numerous works²⁶ and endorsed by important international bodies on the basis of the scientific data of group psychology and sociology, and of the special nature of the legal personality of the state, as well as on that of the recognition of the international personality of the state.²⁷ In the memorandum which M. Donnedieu de Vabres, the French delegate, presented to the Committee for the Progressive Development of International Law and its Codification, he called for the recognition and definition of the penal responsibility of states guilty of crimes,²⁸ as well as for the conferring of jurisdiction over crimes against the peace and crimes against humanity perpetrated by states.²⁹ The criminal responsibility of states was likewise affirmed in an amendment to the draft convention on genocide proposed by the United Kingdom on October 16, 1948, in the Sixth Committee of the United Nations General Assembly. This amendment would have added to the text of the draft the following: "Criminal responsibility for any act of genocide as specified in Articles II and IV shall extend not only to all private persons or associations, but also to States, Governments or organs or authorities of the State or Government, by which such acts are committed."³⁰

The imposition of criminal penalties upon the state is by no means inconceivable; nor are measures of safeguard to be excluded.³¹ National

²⁶ For bibliography see V. V. Pella, *La Guerre-crime et les Criminels de guerre*, pp. 58-67.

²⁷ See the resolution quoted above, adopted in 1925 by the Interparliamentary Conference of Washington, and the resolution voted in 1926 by the First International Congress on Penal Law, Brussels, 1926. See also the drafts for an international criminal court adopted in 1926 by the International Law Association, and in 1928 by the International Association of Penal Law.

²⁸ U. N. Doc. A/AC.10/34, May 27, 1947.

²⁹ See Draft for the Creation of an International Criminal Jurisdiction, memorandum from France, U. N. Doc. A/AC.10/21, May 15, 1947.

³⁰ See U. N. Doc. A/C.6/236, Oct. 16, 1948. The U. K. Delegation, together with the Belgian Delegation, then presented a joint amendment in which only the civil responsibility of the state was contemplated. Since the British Delegation wished that the International Court of Justice should decide first of all upon the international responsibility of the state, after which practical measures could be considered, it is obvious that the Court at present has no jurisdiction to determine the penal responsibility of states. See U. N. Doc. A/C.6/SR.103, Nov. 13, 1948.

³¹ See a list of penal sanctions and measures of safeguard applicable to states in the "*Plan d'un Code répressif mondial*," *Revue internationale de Droit pénal*, 1935, pp. 348 ff.

law admits measures of safeguard (*mesures de sûreté*) against individuals and moral persons alike, and they have been applied no less in the sphere of international law. Such steps taken in Germany and Japan as military occupation, control of collective economic, political and intellectual activities, and the destruction of factories capable of increasing the war potential of the two countries are in reality no more than measures of safeguard appropriate to the peril with which a community of the order of a state can confront the international order.

Then there is the question of reparation. Penalties, measures of safeguard and reparation constitute one indivisible whole. All are consequences of crimes against the peace and no useful purpose is to be served by separating them. Nor should they remain within the jurisdiction of different organs.

Whilst, as it has already been said, the criminal responsibility of states is a subject on which some strong prejudices are still held, it is thought that it should be possible in future to achieve some agreement on the application by an international criminal court of measures of safeguard against states.³²

2. Responsibility of Individuals

The Nürnberg and Tokyo Judgments have confirmed what Justice Robert H. Jackson, the United States Chief Prosecutor of the Axis War Criminals, expressed in his report of June 7, 1945, to the President of the United States of America in this way: that there can no longer be accepted "the paradox that legal responsibility should be the least where the power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still 'under God and the law.'"³³ The classical doctrines of international law, that law stops where politics begin, and that the justice or injustice of war is no concern of the law because it is no concern of the courts, have thus been abandoned. Without going into the notion of the "active subject of an offense," a conception sufficiently treated in the contemporary literature of criminal law and familiar to all specialists, it is sufficient to point out here that the individual has become an active subject of international penal law in view of the emphatic affirmation in the Nürnberg Judgment of the primacy of the international obligations of individuals over their duty to the state of which they are subjects. Consequently the performance of a national duty may involve the individual in international criminal liability if such duty

³² See J. A. Roux, "*La responsabilité pénale des collectivités*," *Revue de Droit international* (Sottile), 1948, p. 51.

³³ See this JOURNAL, Supp., Vol. 39 (July, 1945), p. 182. Cf. Sheldon Glueck, *The Nürnberg Trial and Aggressive War*, pp. 47-49, and Alexander N. Sack, *War Criminals and the Defense of Act of State in International Law*.

entails a violation of international law.³⁴ It is in the light of this same principle that the difficult problem of *superior orders*³⁵ is to be considered, particularly in the case where there is a conflict of the national and international obligations of the same individual.

It is thought, therefore, that any permanent international criminal jurisdiction should follow the same rules as to responsibility for crimes against the peace.³⁶ As to crimes against humanity,³⁷ it is clear that an international criminal court is necessary in the future in situations comparable to those upon which the Nürnberg and Tokyo Tribunals passed. But should jurisdiction be given to the international court merely on the ground of the connection of crimes of this category with other offenses within its competence, as was the case with the Nürnberg Tribunal, or should crimes against humanity be treated as having a distinct character and meriting an independent sanction? In this connection the observation of Professor Brierly that it is possible to conceive of crimes against humanity even without any war having broken out is, it is thought, highly relevant.³⁸ As to war crimes proper, "crimes which are really ordinary offences against the law, including the laws of war"—the offenders ought likewise to be tried before an international criminal court. For only such a court, as already mentioned, is sufficiently objective to secure adequate repression without suspicion of partiality.³⁹

³⁴ See Philip C. Jessup, *A Modern Law of Nations*, p. 179. The "*Plan d'un Code répressif mondial*," *loc. cit.*, proposed the primacy of international criminal law for the punishment of international crimes even when they result from an obligation under domestic law.

³⁵ See a luminous study by Alexander N. Sack, *War Criminals and the Defense of Superior Orders in International Law*. See also P. Coste-Floret, "*La répression des crimes de guerre et le fait justificatif tiré de l'ordre supérieur*," *Dalloz*, July 12 and 19, 1945.

³⁶ See, on crimes against the peace, some very interesting questions raised by the Chairman of the International Law Commission, Judge Manley O. Hudson, at the meeting of May 25, 1949, U. N. Doc. A/CN.4/SR.27, p. 3.

³⁷ See also the definition of crimes against humanity proposed at the 8th International Conference for the Unification of Penal Law (Brussels, 1947), in the General Report by M. J. Y. Dautricourt, and in various national reports, Acts of the Conference, pp. 47-64, 108-175 and 227-228; and an outstanding article by Egon Schwelb, "Crimes against Humanity," in the *British Year Book of International Law*, 1946, pp. 178-226.

³⁸ International Law Commission, Summary Record, May 26, 1949, U. N. Doc. A/CN.4/SR.28, p. 7.

³⁹ No discrimination should be made between belligerents. The justice or injustice of the cause has no connection with violations of the law of war. See Donnedieu de Vabres, in U. N. Doc. A/AC.10/34, May 27, 1947, p. 9, and V. V. Pella, *La Guerre-crime et les Criminels de guerre*, pp. 47-49. Supporting this view, Mr. Shushi Hsu made a proposal to the International Law Commission at the meeting of May 31, 1949. U. N. Doc. A/CN.4/SR.30, p. 8. On the punishment of war crimes in general see two excellent articles by Manfred Lachs, "*Crimes de guerre-Délits politiques*," *Revue de Droit international* (Sottile), 1945, pp. 10 ff., and J. B. Herzog, "*Les principes juridiques de la répression des crimes de guerre*," *Revue pénale suisse*, 1946, pp. 277 ff.

But these are not the only offenses which ought to be within the jurisdiction of the international criminal court. This last is no less required in some cases for making effective international guarantees of human rights.⁴⁰ It is also necessary to be precise about the category of international crimes, for only in this way is it possible to dispel the frequent confusion of the group of international crimes consisting of acts against the peace and security of mankind and another group of so-called international crimes, such as piracy, slave trade, traffic in women and children, drug traffic, dissemination of obscene publications, injury to submarine cables, abuses of radio such as the broadcast of false distress signals, coinage offenses, certain types of forgery, and certain types of barbarism or vandalism. The first group consists of acts or omissions internationally injurious, either because they contribute to the preparation or conduct of a prohibited war, or to the violation of the laws and customs of war, or to the creation of situations likely to endanger peace, or finally because they conduce to the pursuit of a national policy revolting to the sentiments of mankind.⁴¹ The second group comprehends offenses which generally do not prejudice international relations.⁴² With regard to these, progress ought to take the form of generalization of the instances in which national courts already have extraterritorial jurisdiction in the direction of universal competence rather than in giving the international criminal court more jurisdiction than it can perhaps adequately handle. All civilized states are interested in the repression of such offenses and there is no reason to suppose that national courts are not objective in dealing with them.⁴³ Thus it would be well to maintain the present system of criminal law, but with the recognition that the court of the place of apprehension

See also Pierre Boissier, "*La répression des petits crimes de guerre*," *Revue internationale de Droit pénal*, 1948, Nos. 3-4, pp. 293-309, and A. Gaspard, "*La répression des attentats aux conventions humanitaires*," *ibid.*, pp. 385-390.

⁴⁰ See draft convention for the protection of *premiers droits de l'homme* prepared by the *Commission française du droit commun international*, *Revue internationale de Droit pénal*, 1948, pp. 385 ff. See also René Brunet, *La Garantie internationale des Droits de l'Homme*, Ch. V: "*Les garanties d'ordre pénal*," pp. 342-357, and his note on the proposals of A. Frangulis to the League of Nations for an international judicial safeguard of human rights, *Dictionnaire diplomatique*, Vol. IV, pp. 337-339. In connection with these questions, a significant address was delivered by A. A. Berle, Jr., at Freedom House, New York, May 4, 1949, in the presence of Mrs. Eleanor Roosevelt, under the auspices of the International League for the Rights of Man.

⁴¹ See V. V. Pella, *La Guerre-crime et les Criminels de guerre*, p. 35.

⁴² See *id.*, and also observations by MM. Gilberto Amado and Ricardo Alfaro at the meeting of the International Law Commission, May 26, 1949, U. N. Doc. A/CN.4/SR.25, pp. 17-18.

⁴³ See the opinion of Professors Donnedieu de Vabres and V. V. Pella as general *rapporteurs* on the question of international jurisdiction at the First International Congress of Penal Law, concurred in by the Congress. Acts of the Congress, pp. 597-601.

(*judex deprehensionis*) should also be allowed to assert jurisdiction in subsidiary ⁴⁴ fashion.

Offenses against the law of nations, however, committed by individuals acting as instrumentalities of states, or with the incitement or abetment of states, should come within the international criminal jurisdiction.⁴⁵ Insofar as concerns the generality of acts which are directed against the peace and security of mankind or international relations and for which the offenders can be held responsible under international law,⁴⁶ liberty is taken to refer the reader to the *Plan for a World Criminal Code* drafted by the present writer in 1935. This Plan enumerates the principal offenses of this category in relation to which it would, it is thought, be most desirable to confer compulsory jurisdiction upon an international criminal court. It likewise endeavors to indicate the general principles of international repression which such a court should apply.

In general, the problems which are raised by the question of the competence of an international court, especially in relation to individuals, make it clear that there is now a new juridical discipline, not to be confused with international criminal law in the classical sense of that term. It does not have to deal, as did classical international criminal law, with the rules of the legal system of each state which regulate the relations of that system to the criminal law of other states. The new international criminal law, which it is preferred to call *inter-State criminal law* (*droit pénal interétatique*),⁴⁷ has for its object the repression of acts violating the fundamental interests of the moral and material order for which the establishment of peaceful relations between members of the international community calls. Its primary concern is with the *acts of states*. Although individuals are also its active subjects, these last are in the majority of cases "representatives of interests which surpass them. They act from

⁴⁴ Insofar as concerns "true piracy," jurisdiction primarily belongs to the captor state. As to universal jurisdiction in this case, see V. V. Pella, "*La répression de la piraterie*," *Recueil des Cours de l'Académie de Droit International de La Haye*, Vol. 15 (1926).

⁴⁵ Some of these cases could have been resolved by means of a system such as was proposed by the United States Delegation in matters of genocide. Accordingly, failing proper national courts, the jurisdiction of an international tribunal "shall be subject to a finding that the State in which the crime was committed had failed to take appropriate measures to bring to trial or had failed to impose suitable punishment upon those convicted of the crime." U. N. Doc. A/C.6/235.

⁴⁶ See the opinion of Professor Jean Spiropoulos at the meeting of the International Law Commission, May 31, 1949, mentioning that there may be crimes against peace and security of mankind other than those listed in the Charter of the Nürnberg Tribunal, U. N. Doc. A/CN.4/SR.30, pp. 10, 11.

⁴⁷ In the expression "inter-State," state is intended to refer only to states having an independent international personality.

collective impulses and represent States."⁴⁸ Even when individuals act *on their own account*, what gives their offenses a special character is the circumstance of their abetment by states. In other words, what is invariably involved is an act which is the expression of, or which is closely connected with, the irregular exercise of its sovereignty by a state.

3. Jurisdiction in Other Cases

The right of states which have apprehended persons accused of certain offenses shocking international public opinion to subject them to the jurisdiction of the international criminal court, instead of proceeding to either trial in their own courts or to extradition, ought also to be accorded. In particularly delicate circumstances, and especially in cases of politico-social crimes of great magnitude, a state may well have every reason to repair to the international criminal court in order to put a limit to the international responsibility in which either the refusal of extradition or the decision of its own courts may involve it. What would meet such cases adequately would be a purely optional competence on the part of the international court.⁴⁹

⁴⁸ See Donnedieu de Vabres, *Droit pénal approfondi*, pp. 2-4. In maintaining the term "inter-State Penal Law" applied by the writer to this new branch of law as early as 1925 in his book, *La criminalité collective des Etats*, M. Donnedieu de Vabres recognized that "the expression has the advantage of emphasizing the autonomy and special character of international penal law as traditionally understood. The distinction between international criminal law considered in its classical aspect and inter-state criminal law is just as useful as that between private international law and public international law on which it is founded. The first has to do with the sanction of private relations. The second with the sanction of international relations under public law." It is obvious that, as soon as a juridical order is set up, the best name for this new branch of law would be supranational criminal law. See the writer's communication to the *Académie des Sciences morales et politiques de l'Institut de France*: "*Fonctions pacifisatrices du droit pénal supranational et fin du système traditionnel des traités de paix*," Feb. 17, 1947, p. 15. See also two most valuable studies by Joseph Dautricourt, "*Le Droit pénal dans l'ordre public universel*," *Revue de Science criminelle et de Droit pénal comparé*, 1948, No. 3, pp. 481-519, and by Antoine Sottile, *Les Criminels de Guerre et le Nouveau Droit Pénal International*, pp. 17 ff.

⁴⁹ The option by the states between national or international criminal jurisdictions was provided in Art. 2 of the 1937 Convention for the Creation of an International Criminal Court and in Art. 6 of the 1948 Convention for the Prevention and Repression of Genocide. The London International Assembly in 1941 proposed also, besides some cases of compulsory jurisdiction, other cases of optional jurisdiction of an international criminal court over crimes in respect of which a national court of any of the United Nations had jurisdiction, but which the state concerned did not wish, for political or other reasons, to try in its own courts. An optional jurisdiction of the International Criminal Court could be contemplated also for certain offenses that some states would have already defined in their own domestic legislation, such as war propaganda, diffusion of false documents or false news of such a nature as to endanger international relations, as well as crimes prepared on the territory of a state, and directed against the independence and territorial integrity of another state. For many years a powerful

Two other problems equally need to be solved. The first is the question of the right which the international court should have, or of the freedom which the convention establishing it might usefully give to states, of consultation in matters relating to the settlement of disputes as to jurisdiction, judicial or legislative, which may arise between the states, as well as on the review of irreconcilable sentences, pronounced on the same crime or offense by the tribunals of different states.⁵⁰ As Professor Scelle has written:

experience as well as logic has demonstrated the need for permanent international organs of judicature in criminal cases as well as in questions of private international law in order to achieve the elimination of conflicts of law and jurisdiction and the unification of procedures of execution and of procedural and police coöperation.⁵¹

In the second place, it would be desirable to remit to the international criminal court any case of an "individual offender who cannot be brought before the court of the particular State, either because the place of his crime is unknown, or because the sovereignty of this territory is contested."⁵²

ORGANIZATION AND PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT

It would be possible to dilate at length on such aspects of the organization of the international criminal court as its composition, the number and method of appointment of judges, disqualification and removal of judges, diplomatic immunities, the method of election of the president, vice president and registrar, special chambers of the court, the international public prosecutor's office, and, equally, on such procedural questions as the types of proceedings (criminal prosecution and proceedings for compensation or damages), preliminary inquiry in general (commissions of inquiry, evi-

opinion has supported the idea of the protection of international peace through domestic legislation. See proposals of E. St. Rappaport for the repression of war propaganda presented in 1927 at the First International Conference for the Unification of Penal Law, held in Warsaw. See Acts of the Conference, pp. 39 ff. See also: Pella, "*Mémoire élaboré à la demande de la Conférence du Désarmement, sur l'adaptation des législations nationales au stade actuel du développement de la vie internationale*," (Doc. Conf. D.-C. D. M. 20, June 23, 1932), and an important survey by Mirkin-Guetévitch, *Le Droit Constitutionnel et l'organisation de la paix*, Ch. IV.E: "*Le droit interne de la paix*," *Recueil des Cours de l'Académie de Droit International de La Haye*, Vol. 45 (1933), pp. 746-766.

⁵⁰ This text was adopted by the First International Congress of Penal Law in July, 1926, on the proposal of Prof. Donnedieu de Vabres and the present writer as general rapporteurs of the congress, and with an amendment by Mr. Henri Rollin concerning the revision of incompatible sentences. See Acts of the Congress, *Vocu* No. 2, p. 634; and the note by the French delegate in the Commission for the Progressive Development of International Law and its Codification, U. N. Doc. A/C. 10/21, May 15, 1947.

⁵¹ See Scelle, *Droit international public* (3rd ed.), p. 958.

⁵² See *Vocu* No. 5 of the Resolution of the International Association of Penal Law,

dence, and rules of court) and judgment (appeals, status of national judges, methods of rendering judgment, etc.). In connection with each of these aspects problems arise of greater or less importance and solutions to them have been offered in the various draft statutes for such a court which have been prepared and in the charters of the Nürnberg and Tokyo Tribunals.⁵³ Some of them could, moreover, be dealt with adequately in the rules of procedure which the court itself would draw up. Only the essential ones are, therefore, dealt with here and, as to the rest, the reader is referred to the sources already mentioned.

1. *Should the International Court be Permanent or Ad Hoc?*

The draft convention on genocide prepared by the United Nations Secretariat envisaged as one alternative an *ad hoc* tribunal for the repression of that offense. According to this draft, every state party to the Genocide Convention was invited to nominate two persons well versed in matters of criminal law to fulfil the functions of judges of an international criminal court. The names of all the persons thus designated by the states were to be communicated to the President of the International Court of Justice, who in turn would draw up a list of all these persons. Had a state asked a competent organ of the United Nations, Security Council or Economic and Social Council, bring a person accused of a crime of genocide before the International Criminal Court and had such a request been accepted, the Court would then have proceeded in the election of the judges of the *ad hoc* international criminal court. These judges would have been convened by the president of the court. After the constitution of the court they would have had to decide only on the case which occasioned their convocation. The procedure would have been to a large extent that of the Convention of 1937 for the Creation of an International Criminal Court.⁵⁴

This suggestion was disapproved. Governments opposed to any sort of international criminal court rejected it and those favorable to the idea of such a jurisdiction did not think it went far enough. The International Military Tribunals of Nürnberg and Tokyo are indeed precedents for an *ad hoc* court; but it is not thought that they are relevant, as permanence and prior establishment would appear to be characteristics essential to a truly impartial court. In other words, the court ought to be in existence and its judges to have been appointed already before the commission of any offense it is to try. The objection of the great expense of a permanent

⁵³ As to the preparatory work for the creation of the International Military Tribunal which sat at Nürnberg, it is interesting to recall the statements of Sir David Maxwell Fyfe, Robert H. Jackson, Robert Falco, André Gros, I. T. Nikitchenko and A. N. Trainin, in International Conference on Military Trials, London, 1945 (Department of State Publication 3080, February, 1949).

⁵⁴ See U. N. Doc. E/447, June 26, 1947, Draft No. 2, Arts. 2-6.

organ could be met by providing that the court should only sit when seised of an offense within its jurisdiction. And in general it is to be noted that the General Assembly Resolution of December 9, 1948, respecting the setting up of an international criminal court envisaged a juridical organ of a permanent character, such as a criminal chamber of the existing International Court of Justice.

2. *Should the Court be a Chamber of the International Court of Justice or an Independent International Criminal Court?*

It has been thought by the writer that a criminal chamber in the International Court of Justice would ideally be preferable to an independent organ. For, as has been said,⁵⁵ the creation of such a chamber would be in accordance with the principle of the identity of civil and criminal courts which characterizes the judicial organization of many countries and which it is desirable to observe in the international sphere for the same reasons as those which commend it in the domestic sphere.⁵⁶ But, as a result of researches made in his capacity as *rapporteur-général* of the conference which drew up for the League of Nations the Convention for the Creation of an International Criminal Court in 1937, the present writer thinks that practical considerations necessitate the selection of the alternative of an independent organ. For the setting up of a criminal chamber of the International Court of Justice would involve the revision of the Statute of that tribunal, which can only be done with great difficulty in any case and which would be the more difficult if certain states were to persist in their attitudes of opposition to all ideas of an international criminal court.

3. *Should There be One or More International Criminal Courts?*

The French representative in the Committee for the Progressive Development of International Law and its Codification contemplated two courts in his memorandum.⁵⁷ The advantage of his scheme would be that, while the International Court of Justice would be supreme in all questions of law, it would be concerned with questions of fact in only the gravest cases. However, although the scheme is based on the practice of various states, it is not thought that there is any chance of its adoption. For it would—no less than the setting up of a criminal chamber therein—involve amendment of the Statute of the International Court of Justice. It is thought better to look for one single court. If there should arise any great pressure of business—particularly in relation to war crimes, which can on

⁵⁵ See article by Prof. Donnedieu de Vabres, "*La Cour Permanente de Justice Internationale et sa vocation en matière criminelle*," *Revue internationale de Droit pénal*, 1924, Nos. 3-4.

⁵⁶ See V. V. Pella, *La criminalité collective des Etats*, pp. 281 ff.

⁵⁷ See U. N. Doc. A/AC.10/21, May 15, 1947.

occasions be very numerous—the court could always develop additional divisions.⁵⁸

4. Number, Election and Term of Office of Judges

In order to ensure both the representation of the different legal systems of the world and the principal cultures⁵⁹ and to secure the court's capacity to handle possible pressure of business, it is thought that the number of judges should be fairly large. The Convention of November 16, 1937, for the Creation of an International Criminal Court provided five judges and five alternate judges—a small number, since this court was set up to deal only with cases of terrorism. Fifteen judges and eight alternates were to be nominated according to the draft of the International Association of Penal Law. In the draft statute of the *Commission française du droit commun international*, which met in 1948, eighteen judges were provided.⁶⁰ Qualifications for election should in general be those stated in Article 2 of the Statute of the International Court of Justice.⁶¹ It would be desirable to give equal weight to knowledge of criminal law and of international law in view of the complexity of the problems of both these systems which would be likely to arise within the court's jurisdiction.⁶²

⁵⁸ The International Association of Penal Law studied at length what would be the impact of extreme pressure of business upon an international criminal court and offered some interesting solutions in a draft statute. If the number of judges were insufficient to man all the divisions, vacancies could be filled by drawing of lots from an electoral list of members of the international criminal court, such as is provided for the International Court of Justice in Art. VII of its Statute. See International Association of Penal Law, Draft Statute for an International Criminal Court, Arts. 13, 14 and 36, and report. See also V. V. Pella, *La criminalité collective des États*, pp. 284-285, and Art. 43, Annex No. 1 for the creation of an international criminal court, in documents on the crime of genocide prepared by the Secretariat of the United Nations, Doc. E/447, June 28, 1947.

⁵⁹ Of historical interest is a suggestion of the Advisory Committee of Jurists of 1920 to the League of Nations for the creation of a High Court of International Justice competent to try crimes constituting a breach of international public order or against the universal law of nations, and providing that this court should be composed of one member for each state, to be chosen by the group of delegates of each state to the Court of Arbitration. See Report of the Proceedings of the Advisory Committee of Jurists, 1920, p. 748.

⁶⁰ See *Revue internationale de Droit pénal*, 1948, Nos. 3 and 4.

⁶¹ In order to insure the international independence and the authority of the judges, the electoral body should be composed of representatives of most of the members of the international community. Therefore any system restricting the right to elect judges to a limited number of Powers, such as appears in the draft of a Convention for the Establishment of a United Nations Joint Court, approved on Sept. 24, 1944, by the United Nations War Crimes Commission, should be rejected. Of course, direct appointment of the judges by governments, as provided in the charters of the Nürnberg and Tokyo Tribunals must equally be rejected.

⁶² Specialists in international criminal law were to be appointed according to the drafts of the International Association of Penal Law (Art. 2), and of the *Commission*

Appointment might well be for nine years, as in the case of the judges of the International Court of Justice. Election of judges should be by the United Nations General Assembly and Security Council in the same manner as Articles 4 to 12 of the Statute of the International Court of Justice prescribed.⁶³ It is true that the Convention of 1937 made the Permanent Court of International Justice, as opposed to the League of Nations Assembly and Council, responsible for the election of judges to the tribunal it contemplated. But this deviation was made in order to satisfy certain states which did not wish to see the latter linked to the League.⁶⁴ In the draft of the *Commission française du droit commun international* it was provided that the judges should be elected by the General Assembly and the Security Council from a list of candidates made up from twelve nominations by the Secretariat and two by every Member of the United Nations. By giving this right of nomination of candidates to the Secretary General, it was probably intended to enlarge the basis of appointment of the judges beyond the national interests of states.

5. *The Seat of the Court and its Registry*

It is thought that the seat of the court ought to be at The Hague but that the possibility of its sitting elsewhere on occasion should not be excluded; for, apart from the happy augury of the home of the International Criminal Court, the choice of The Hague, besides permitting close relations between the judges of the two tribunals, would allow the assignment to the Registry of the International Court of Justice of comparable functions in relation to the criminal court. This would be both a simple and an economical arrangement.⁶⁵

6. *Should an International Public Prosecutor's Department be Set Up?*

The setting up of an international public prosecutor's department would materially contribute to the effective functioning of an international criminal court.⁶⁶ The First Congress of the International Association of Penal

française du Droit commun international (Art. 4). Professor Kelsen provided in his draft (Art. 4) "twenty-four members, seventeen members being experts in international law, seven members experts in criminal law." See Kelsen, *Peace Through Law*, Appendix.

⁶³ See a similar system in the draft of the International Association of Penal Law (Arts. 4-6).

⁶⁴ See also remarks by Sir John Fischer Williams and observations by Judge Basdevant and the writer in *Acts of the Conference*, League of Nations Doc. C.94.M.47. 1938.V., pp. 124, 163.

⁶⁵ For these reasons the Conference of 1937 selected The Hague as the seat of an international criminal court and provided that the Registry would be incorporated with that of the Permanent Court of International Justice. See Arts. 4 and 13 of the Convention.

⁶⁶ See V. V. Pella, *La criminalité collective des Etats*, "Organisation d'un Ministère public international," 1925, pp. 287 ff.

Law discussed the question in 1926.⁶⁷ Some of the functions of such a department are indicated in the Charter of the Nürnberg Tribunal.⁶⁸ The French draft convention on genocide, submitted to the United Nations in February, 1948, envisaged such a department.⁶⁹ However, if a scheme similar to that of the 1937 Convention were adopted, such a department would not be necessary.

7. *Institution of Proceedings*

As concerns proceedings against states—assuming, of course, the acceptance of the principle of the criminal responsibility of states—the Security Council alone should be empowered to institute such proceedings. But states must also be permitted to institute such proceedings in relation to the exercise of the right of self-defense, individual or collective, provided by Article 51 of the Charter of the United Nations.⁷⁰

Three methods of proceeding against individuals are possible. First, states could be empowered to institute proceedings against individuals directly. This system was adopted in the 1937 Convention for the Creation of an International Criminal Court, and is implicit in Article 6 of the Genocide Convention, whereby a state may summon offenders before the international criminal court when it has accepted the jurisdiction of this court.

Alternatively, an appropriate organ of the United Nations could undertake the function as intermediary. The second system was envisaged in the Draft No. 1 annexed to documents on genocide prepared by the Secretary General of the United Nations. Accordingly, every state, under conditions provided in the convention, was to be able to request the Economic and Social Council to bring the accused before the international court. If the Council agreed, it would nominate persons in charge of the prosecutions. It was also suggested that the Security Council should decide on such questions, and it was therefore left to the conference or the organ of the United Nations in charge of drafting a convention for the creation of an international criminal court to choose between the two Councils.⁷¹ In that case, states accepting the jurisdiction of the court could refer charges and the evidence in support of them to that organ. It is felt that the appropriate organ would be the Security Council, which is best qualified to deal with cases of crimes against the peace, war crimes

⁶⁷ See *Voeu* No. 7 of the Resolution, Acts of the Congress, p. 364.

⁶⁸ See in the Charter annexed to the London Agreement of Aug. 8, 1945, duties of the General Prosecutors (Art. 15), and similar provisions in the Tokyo Charter of Jan. 19, 1946.

⁶⁹ U. N. Doc. E/623/Add.1, Feb. 5, 1948, Arts. 5 and 6.

⁷⁰ See also Arts. 20 and 26 of the Draft Statute of the International Association of Penal Law.

⁷¹ See U. N. Doc. E/447, June 26, 1947, Art. 2, p. 67.

The problem of execution of sentences imposed on individuals is a wholly different one. It could be solved by entrusting the execution of sentences or measures of safeguard involving deprivation of liberty to a state designated by the court and consenting to undertake the task. The state seising the appropriate organ of the United Nations with a particular case ought possibly not to be able to refuse its consent in this regard. The authors of the Convention of 1937, it is to be noted, considered it necessary to make a stipulation to this end in order to exclude the escape of a convicted person from all punishment by reason of the unwillingness of any state to see the sentence carried out.⁸³ This arrangement is open to criticism. Impartiality ought to be the keynote not only of trial but also of punishment or measures of safeguard. For this reason Article 70 of the draft of the International Association of Penal Law provided for the exclusion of both the prosecuting state and that of which the defendant was a national from responsibility for the carrying out of sentences.

There is also the question of the death penalty. The state designated by the court to carry out a sentence of death ought to be entitled to substitute therefor the maximum sentence of imprisonment prescribed by its own law if the latter makes no provision for capital punishment.⁸⁴

In order to give the necessary flexibility to the international repression of international crimes, the Security Council or another designated organ should be empowered at any time to suspend or remit wholly or in part any sentence or measure of safeguard imposed upon an individual. A prerogative of clemency should be made applicable to individual offenders. It could be exercised by the state carrying out a sentence, in the absence of objection from the appropriate organ of the United Nations within some such period as one month.⁸⁵

CONCLUSION

It is impossible to conclude this survey without emphasizing that the setting up of an international criminal court requires to be undertaken with full realization of the impact of the complexities of the present world situation upon that task. The contemporary world is one in which science has largely abolished physical distances, but in which moral barriers tend to become increasingly difficult to cross.⁸⁶ It is this circumstance which impels many jurists to adopt an attitude of "cautious reserve" lest de-

⁸³ See Art. 40 of the 1937 Convention.

⁸⁴ Art. 37 of the draft of the International Association of Penal Law provided that the international penal court, however, should not have to condemn anyone to death.

⁸⁵ See Art. 39 of Draft No. 1 for the creation of an international criminal court, U. N. Doc. E/447, June 26, 1947, and Donnedieu de Vabres, *Rapport sur l'organisation d'une juridiction pénale internationale*, Institute of International Law, Brussels, 1948, p. 6.

⁸⁶ See J. M. Yepes, "Les accords régionaux et le droit international," *Recueil des Cours de l'Académie de Droit International de La Haye*, Vol. 71 (1947), pp. 238 ff.

velopments in international law should prejudice the freedom of action—or reaction—of the states to which they belong. This reserve is the principal source of the resistance with which the idea of setting up an international court meets, whether such resistance takes the form of legal dogmatism or infinite delay. Moreover, it must be recognized that some considerable scepticism as to the value of law in international life prevails today. The belief that law is the creature of force, too, is widely held and can only serve to increase the actual uncertainties of the rule of law.⁸⁷ But the present writer holds that Mr. James T. Shotwell has well said:

No greater mistake could be made than to conclude from this tragic page of history . . . that international law is no longer important or valid. On the contrary, it must be strengthened and reformed as the safeguard for those stable relations between nations which are necessary for their prosperity.⁸⁸

It ought also to be stated in conclusion that the new branch of law which international penal law constitutes is as yet little known even to many lawyers. As Assistant Secretary of State Ernest A. Gross said in an address in Washington on July 27, 1949, to the United Nations League of Lawyers, the conception of international criminal law in the mind of the average lawyer—and indeed in the mind of the above-average lawyer—is shrouded in considerable confusion and uncertainty. And what is not clear is very often not liked. So international penal law provokes a certain distrust as well as curiosity. The number of those active in the field, as compared with the great numbers of lawyers who take practical or theoretical interest in public law, private law and economic law, is still very small. When in 1919 the present writer elaborated a draft scheme of an inter-State criminal law, very few had any confidence in its possibilities for the preservation of peace. And even though during the following years jurists of repute and important international organizations came gradually to accept the idea of such a law, it needed, however, the horrors which led to the Nürnberg and Tokyo Trials a quarter of a century later to produce a fuller literature of the new branch of law. The Nürnberg Trial, which has been aptly described as “a dramatic application of rules of international law to individual and corporate criminals,”⁸⁹ and which influenced “not only governmental and diplomatic problems but at the same time also international law, criminal law and morality,”⁹⁰ should surely have been more than merely another page of history. It should

⁸⁷ In connection with these questions, see an interesting article by Yuen-li Liang in *Tulane Law Review*, Vol. XXII (March, 1948), No. 3, p. 378.

⁸⁸ *The Great Decision*, p. 227.

⁸⁹ See A. H. Feller, “We Move, Slowly, Toward World Law,” *The New York Times Magazine*, June 5, 1949, p. 37.

⁹⁰ See Blocq-Mascart, “*La loi internationale à Nuremberg*,” *Le Monde français*, Vol. IV (1946), p. 27.

have been the source of new institutions, not merely the end of a story but a first step on the difficult path leading to the protection of peace through criminal law. The vital opportunity of the cessation of hostilities with the Axis Powers, with all its possibilities for rapid and important advances in international life, should have been seized. Haste should have been made to take advantage of the peaceful intentions of peoples. Or at least advantage should have been taken of the opportunity the Nürnberg Judgment gave, as was indeed attempted by President Truman and the Secretary General of the United Nations in October, 1946. The former regarded the Charter of the Tribunal as pointing the way in which we can seek agreement with some chance of success, whilst Mr. Lie declared that it was vital to incorporate the principles applied by the Nürnberg Tribunal into the code of international law as soon as possible. With this lead, the United Nations General Assembly, by the resolution of December 11, 1946, unanimously recognized the importance of the task and the necessity of achieving it.

It is four years since the General Assembly thus spoke in terms of the first importance of the question and of the urgency of the task. But already criticisms tending to throw doubt on even the moral value of the Nürnberg and Tokyo Judgments are to be heard in some circles. Since the United Nations are having such great difficulty in investing the principles on which those judgments are based with an application to the future and a permanent value, the consonance of these principles with law, justice and international morality is being questioned. Thus, in criticizing the decisions of certain tribunals set up by the occupation authorities and demanding their revision, Mr. Karl Arnold, Prime Minister of Rhine-Westphalia, declared on July 25, 1949, that the revival of international law which was to have been based on the Nürnberg Judgment, had come to a complete stop.⁹¹ In this domain time is like rust: slowly it produces ruin. If the International Law Commission makes no effort to recover the four lost years, the Nürnberg and Tokyo Judgments will indeed remain mere pages of history.

The question today is whether to rest content in the international sphere with a *primitive criminal law* such as existed at the beginnings of human society or whether, on the contrary, punishment should be confided to an international court.⁹² If at the present time the rules of international law indeed embrace only a small portion of the domain of international relations, and if the aim should be to extend this system "until its content approximates to that of national legal systems,"⁹³ there can be no doubt but that one of the most urgent steps to be taken is the constitution of a

⁹¹ See *Le Monde*, July 26, 1949.

⁹² See a suggestive statement by Prof. Thomas Givanovitch, at the First International Congress of Penal Law, Acts of the Congress, p. 575.

⁹³ See A. H. Feller, *loc. cit.*, p. 10.

MAINSPRINGS OF CHINESE COMMUNIST FOREIGN POLICY

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I. THE RÔLE OF THE CHINESE COMMUNIST PARTY

With the proclamation on October 1, 1949, of the establishment of the Central People's Government of the People's Republic of China, Chinese Communism formally passed into its constitutional phase.¹ Prior to that date, the Chinese Communist Party had been the *only* political organization exercising authority throughout *all* of the territories held by Communist armed forces; thereafter, to all external appearances, it became but one of several political parties and groups participating in the coalition government of the "people's democratic dictatorship." Nevertheless, the new constitutional façade does not alter the political realities in Communist China. Policies and attitudes formulated by the Chinese Communist Party in the pre-constitutional phase have survived the transition without noticeable modification. In fact, the Chinese People's Political Consultative Conference which adopted the new constitutional forms and which will function as the highest legislative organ of Communist China until an All-China People's Congress comes into being,² traces its origins to a resolution of the Central Committee of the Chinese Communist Party;³ its membership was largely determined by the Communist Party; and the constitutional forms which it endorsed corresponded in every essential particular with the previously announced policies and intentions of the Chinese Communist Party leadership. Moreover, the "common program" adopted by the Chinese People's Political Consultative Conference on September 29, 1949,⁴ incorporates, without modification, the "minimum program" of the Chinese Communist Party as developed over a period of

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¹ For the full text of Mao Tse-tung's proclamation, see *China Digest* (Hongkong), Vol. 7, No. 1 (Oct. 5, 1949), p. 2. A complete documentation in English of the proceedings and decisions of the Chinese People's Political Consultative Conference held in Peking (renamed from Peip'ing), Sept. 21-Oct. 1, 1949, will be found in the *China Digest* issues of Oct. 5 and 19, 1949.

² See Chapter 3 of the Organic Law of the Chinese People's Political Consultative Conference, adopted Sept. 27, 1949. *China Digest*, Vol. 7, No. 2 (Oct. 19, 1949), pp. 17-18.

³ Slogans for the commemoration of May Day, 1948, broadcast by the official Chinese Communist North Shensi Radio, April 30, 1948.

⁴ Full text in *China Digest*, Supp. to Vol. 7, No. 1, pp. 3-9.

years in the writings of Mao Tse-tung⁵ and the resolutions of the Chinese Communist Party.⁶ In accepting the "common program," the Chinese Communist Party simultaneously announced its firm attachment to its own "maximum program" which calls for the eventual Communization of China according to the teachings of Marxism-Leninism.⁷ For the present, it proposes to work within a coalition framework until the necessary pre-conditions for the realization of its maximum program have been created. Chinese Communism is therefore a *continuum*, which utilizes a succession of appropriate constitutional methods according to the necessities of the existing revolutionary situation.

Under these circumstances, a special semantics must be employed to ascertain the true character of existing relationships between the Chinese Communist "party" and the Central People's "government." What is called the "party" is in actuality the supreme "governmental authority"; what is called the "government" is in actuality merely an "administrative organization" of lower degree created to implement the minimum program of the party during the present period of the "new democracy," and organically incapable of controlling the "party" or of escaping its direction and leadership. Mao Tse-tung has explicitly stated the necessity for the continuous leadership of the Chinese Communist Party within any form of revolutionary coalition or constitutional framework.⁸ The leading

⁵ Mao's principal ideological works include: *Chung-kuo ko-ming yü chung-kuo kung-ch'ang-tang* (The Chinese Revolution and the Chinese Communist Party), Nov. 15, 1939; *Hsin min-chu chu-i lun* (On New Democracy), Jan. 19, 1940; *Lun lien-ho cheng-fu* (On Coalition Government), April 24, 1945; *Mu-ch'ien hsing-shih ho wo-men ti jen-wu* (The Present Situation and Our Tasks), Dec. 25, 1947; and, most recently, *Lun jen-min min-chu chuan-cheng* (On the People's Democratic Dictatorship), June 30, 1949, an English translation of which appeared in *For a Lasting Peace, for a People's Democracy!* (Bucharest), July 15, 1949, p. 5, under the title: "The Dictatorship of People's Democracy."

⁶ A formal ideological declaration was adopted by the Seventh Congress of the Chinese Communist Party on June 11, 1945, in the form of a "general introduction" to the revised Party constitution; see the translation by the present writer in *Congressional Record*, Vol. 95, No. 134 (July 26, 1949), Appendix, pp. A4993-A4997.

⁷ See the major address by Liu Shao-chi, vice chairman of the new Central People's Government and vice chairman of the Politburo of the Chinese Communist Party, before the CPPCC on Sept. 21, 1949: "China Enters the Era of People's Democracy," *China Digest*, Vol. 7, No. 1, pp. 6-7.

⁸ As early as Nov. 15, 1939, Mao Tse-tung made it clear that "the leadership of this . . . revolutionary task rests upon the shoulders of the political party of the Chinese proletariat—the Communist Party—and without the leadership of the Chinese Communist Party, no revolution can succeed." *The Chinese Revolution and the Chinese Communist Party*, Part II (G). The same theme was later developed to define the rôle of the Party within a united front coalition: "Without the broadest united front, comprising the overwhelming majority of the whole national population, the victory of China's new democratic revolution is impossible. But this is not all. This united front must also be under the firm leadership of the Chinese Communist Party. Without the firm leadership of the Chinese Communist Party, no revolutionary united front can be victorious." *The Present Situation and Our Tasks*, Part VII.

personalities of the Chinese Communist Party hold the key positions within the Central People's Government: Mao Tse-tung, chairman of the party, is also the chairman of the Central People's Government; and Chou En-lai, a member of the Politburo of the party, is the Premier and Foreign Minister. The "minimum program" of the Party is the "common program" of the participating parties and groups. Finally, the Chinese Communist Party has accumulated an extensive practical governmental experience dating from the establishment of the Chinese Soviet Republic in 1931. The policies and perspectives evolved in the course of that experience are completely absorbed by the new People's Republic of China. The mainsprings of Chinese Communist foreign policy therefore flow from the Party and not from the Government which is only its instrument. Although this attribution to a political party of the capacity to maintain a "foreign policy" may do violence to the traditional concepts of international law, any other approach would be unrealistic and illusory.

Foreign policy in Communist China is a conscious instrument of social revolution, inseparably linked to the ideological perspectives of Marxism-Leninism. From the doctrinal point of view

The Chinese Communist Party is based on the principles of Marxism-Leninism. . . . [It] is based on the dialectical and historical materialism of Marx. . . . The task of the Chinese Communist Party will be to struggle, by necessary steps and according to the requirements of China's social and economic development and the will of her people, for the realization of Socialism and Communism.⁹

The Party firmly adheres to the belief that its doctrines are derived from the immutable premises and assumptions of Marxism-Leninism, and that its political tactics, techniques and working methods at any given moment are developed with absolute fidelity to that framework of thoughts and ideas. This belief motivates Chinese Communist leaders who are no longer the impatient visionaries of 1921 but the hard-headed, experienced political administrators of 1950 who have built up and seasoned an impressive political apparatus. They have hammered out a hard core of doctrine to sustain their propaganda and to guide them in the solution of the perplexing problems of a practical order that arise over a broad front.

We need no longer wait for the "dust to settle" to have a complete understanding of the basic principles underlying the policies and attitudes of the Chinese Communist Party in the field of foreign affairs. Doctrine

⁹ General Introduction to the Party Constitution, *loc. cit.*, note 6, *ante*. "Socialism" and "Communism" are doctrinal conceptions to be read in accordance with the current Marxist-Leninist view. "Socialism," according to Stalin, is the "first or lower phase of Communism." Report on the Draft of the U.S.S.R. Constitution, in A. Y. Vyshinsky, *The Law of the Soviet State* (Babb. trans., New York, 1948), p. 135. This view is faithfully mirrored in the literature of Chinese Communism where, however, Mao Tse-tung has developed the concept of "new democracy" as a necessary transition to the subsequent sequence: Socialism-Communism.

and recent practice point very clearly to the position of the Party leadership on such questions as: (1) the status of pre-revolutionary treaties between China and foreign Powers; (2) the conditions on which diplomatic relations will be established with other states; (3) the treatment of foreign nationals and properties in China; (4) the relations between Communist China and revolutionary movements in other Asiatic countries; and (5) policies to be followed with respect to particular foreign countries, such as the United States and the Soviet Union. They also throw light on the much debated question whether Sino-Soviet relations will founder on the rocks of "Titoism."

II. FUNDAMENTAL DOCTRINES AFFECTING FOREIGN POLICY

Doctrinal Emphasis

Chinese Communism has a stern doctrinal core. This does not preclude the possibility that Chinese Communism will undergo progressive modifications of technique and substantive content as the movement proceeds from the stage of militant revolutionary action to a more stabilized constitutionalism of the "new democracy," now re-interpreted as the "people's democratic dictatorship."¹⁰ These and other modifications are integral features of the dialectical method of Marxism-Leninism, which carefully avoids commitment to inflexible tactics. Therefore, the apparent deviations and modifications likely to accompany the practices of Chinese Communism in a new phase of its experience should not be interpreted as reflecting the diminished enthusiasm of the Chinese Communist Party for the doctrines that brought it to power or as entailing the substitution of other principles for those now derived from Marxism-Leninism.

On the contrary, the principles of Chinese Communism have steadily evolved with an eye to the special problems of China, but within a cohesive

¹⁰ In the "new democratic" phase of the revolution, the Chinese Communists intend to function politically on the basis of a "coalition" of all anti-Kuomintang, anti-"reactionary" revolutionary elements; while, from the economic point of view, the national economy will combine state and private ownership under a planned economy. This theme recurs throughout the works cited in note 5, *ante*. The concept of the "people's democratic dictatorship" is more specifically concerned with the definition and political treatment of the "reactionaries" over whom a dictatorship is to be maintained by the "people." This produces an important principle of Communist law, in which a distinction is made between "people" and "citizens." In his report of Sept. 22, 1949, on the "common program" under consideration by the OPPCC, Chou En-lai remarked: "There is a difference between 'people' and 'citizen.' 'People' mean the working class, the peasantry, the petty bourgeoisie, the national bourgeoisie and certain [other] patriotic democratic elements. . . . [The remaining, reactionary elements] are not within the category of 'people' but are 'citizens' of China. For the time being they cannot enjoy the rights of the people but they have to observe the obligations of citizens. This is the People's Democratic Dictatorship." This distinction may possibly be extrapolated to establish a basis for the discriminatory treatment of at least certain foreign nationals in Communist China.

Marxist-Leninist framework. A remarkable inner consistency has been achieved in the doctrinal expositions and clarifications of Mao Tse-tung, as well as in the writings of Chu Teh (the military Commander-in-Chief), Liu Shao-chi (Vice Chairman of the Politburo and of the People's Revolutionary Military Committee), Lu Ting-yi (Editor-in-Chief *Emancipation Daily* and Chief of the Party Propaganda Department), Jen Pi-shih (a leading member of the Central Committee and Politburo), and other representative figures. At the same time, the flexible Party doctrine has succeeded in explaining and justifying such major reorientations of policy as the change from collaboration with the Kuomintang (1923-1927), to opposition to the Kuomintang (1927-1937), to collaboration within an anti-Japanese united front (1937-1945), and to militant civil war against the Kuomintang in the most recent period (1946-1949).

Marxist-Leninist doctrine provides a blueprint for action over the whole range of political, economic, social and cultural policies. On the basis of an analysis of the nature of the class struggle under varying conditions, it determines the relationship of Chinese Communism to Communism in other countries, to other national revolutionary movements, and to capitalist countries; it defines the phases through which the proletarian revolution in China must evolve before reaching its goal, and formulates tactics suitable for each phase of the struggle; and it controls the social changes which must be wrought in the fabric of Chinese society before the revolution can be fully completed. The present attitudes of Chinese Communist leaders are entirely faithful to the plans and calculations of a decade ago, even though the political environment was then entirely different.

To Chinese Communists, doctrine is inseparable from practice. This is a necessary consequence of the dialectical method. The Communist rank and file is regularly warned of the essential and intrinsic importance of the doctrinal approach to the solution of all problems. Ten years ago, Mao Tse-tung wrote:

The Communist outlook is the outcome of the whole ideological development of the world bourgeois period, and Communism is, at the same time, a new kind of social system. The Communist ideological system and social system is different from any other; it is the most significant ideological and social system of any; it is the most comprehensive, the most progressive, the most revolutionary. . . .¹¹

Again, with victory in sight late in 1948, Mao warned that the Chinese Communist Party must always base its actions upon a conscious doctrine:

¹¹ On *New Democracy*, p. 79. The reference is to the translation given in Appendix B to the Report of Subcommittee No. 5 of the Committee on Foreign Affairs, House of Representatives, on the Strategy and Tactics of World Communism, Supp. III(C): Communism in China, 81st Cong., 1st Sess., House Doc. No. 154—Pt. 3 (Washington, 1949), pp. 67-91.

To carry out a revolution there must be a revolutionary party, a party of the new type on the model of the Party of Lenin and Stalin. The working class and the people as a whole cannot be successfully led in their struggle against imperialism and its lackeys without such a revolutionary party based on the ideological, organizational and theoretical principles of Marxism-Leninism and guided by the all-powerful ideas of Marx, Engels, Lenin and Stalin. . . .¹²

Whatever the Communist strategy or tactic of the moment, it is always closely related to the requirements of a doctrine which is rigid in spirit but flexible in practice. Marxism-Leninism is understood to be a system of substantive conclusions, but one which incorporates its special dialectical epistemology. Mao Tse-tung has acknowledged some practical limitations on the method. "The field of natural science," he wrote in 1940, remains "generally and temporarily occupied by bourgeois thought." But in the field of the social sciences—in philosophy, politics, economics, military science, historical science, literature and the arts—Marxism-Leninism "has won . . . the most important vantage points and has served to carry through a great transformation."¹³ In the approach to problems of international relations, dialectical method rejects the traditional viewpoint of statesmen and scholars which derives from "bourgeois," Western conceptions of international law and diplomatic practice. Instead, all questions of international law and foreign policy must be examined *de novo*, and traditional legal abstractions must yield before the urgent imperatives of the social revolution. This is a cardinal principle of Chinese Communism. It produces, to Western eyes, a seemingly irrational, topsy-turvy, cart-before-horse view of world affairs; but this is precisely what is sought.¹⁴

Nationalism and Internationalism

During the phase of the "new democracy," Communist China sounds an extremely nationalistic note. For China herself, all restrictions on the full sovereignty and independence of the nation must be rejected; and the unlimited jurisdiction of the revolutionary state must extend to all parts of the territory of China. The nationalistic principle consciously extends beyond China to endorse and support any other properly led national

¹² "Revolutionary Forces of the World Rally to Combat Imperialist Aggression," written to commemorate the thirty-first anniversary of the October Revolution and published in *For a Lasting Peace, For a People's Democracy!* (Nov. 1, 1948.)

¹³ On New Democracy, pp. 85-86.

¹⁴ For this reason, Consul General John M. Cabot's coldly logical refutation of Chinese Communist charges of American imperialism misfired completely. See "An American Answer to Chinese Communist Propaganda," originally delivered to the American University Club in Shanghai, Jan. 26, 1949, and reprinted in *Department of State Bulletin*, Vol. 20, No. 502 (Feb. 13, 1949), pp. 179-183.

independence movement which has as its objective the overthrow of foreign imperialism. This position has been clearly stated in a major doctrinal analysis of the subject by a leading Chinese Communist political personality, Liu Shao-chi:

Communists must be the staunchest, most reliable and most able leaders in the movement for national liberation and independence of all oppressed nations; they must be the firmest defenders of the rightful interests of their own nation; they must unconditionally aid the liberation movements of all the world's oppressed nationalities, and certainly cannot conduct aggression on any other nation or oppress national minorities within the country.¹⁵

"Proletarian internationalism," however, must reject the bourgeois-nationalist concept of the nation, based on the profit-seeking and exploitive motive; instead, its view must "proceed from the fundamental interests of the masses of people of the given country and at the same time from the fundamental common interest of the masses of people of all nations." Since aggression results from class exploitation, "the proletariat, who exploits no one and struggles for a social system without the exploitation of man by man, must oppose the oppression of one nation by another." It necessarily follows that there is a "good" (i.e., proletarian) and a "bad" (i.e., bourgeois) nationalism. According to Liu:

The true patriotism of the masses of people of all countries and proletarian internationalism are not contradictory. They are mutually bound up together. True patriotism is warm love for one's own motherland, own people, own language and literature, and the finest tradition of one's own nation, handed down for thousands of years. This kind of patriotism is entirely distinct from pompous, selfish, anti-foreign bourgeois nationalism, and distinct from the narrow closed door attitude, isolationist thinking, sectarianism, parochialism and other national prejudices of the small peasant, reflecting the backward patriarchal system. True patriotism respects the equality of other nationalities and at the same time hopes for the realization of the finest ideals of mankind within its own country. At the same time it advocates the warm unity of the peoples of all countries.

¹⁵ "On Internationalism and Nationalism," broadcast by North Shensi Radio, Nov. 9, 1948; reprinted in *China Digest*, Vol. 5, No. 4 (Dec. 14, 1948), pp. 6-9. A variant text is given in *For a Lasting Peace . . .*, June 1, 1949. All quotations in this section are taken from this article. Written before the Kuomintang will to resist had been fully broken, this article and a related one by Mao Tse-tung (note 12, *ante*) were apparently calculated to publicize the identity of interests between Chinese and Soviet Communists and to assure the Party faithful that no appeasement, no abatement of the revolutionary drive, was contemplated.

Liu Shao-chi, one of Mao's most trusted lieutenants, is a member of the Secretariat, Central Committee and Politburo (Vice Chairman) of the Chinese Communist Party; Vice Chairman of the Central People's Government; chief architect of the revised Party Constitution of 1945; and honorary vice president of the All-China Federation of Labor, a leading Communist-front organization.

The proletarian concept of nationalism is not an end in itself, but a means to other ends: the defeat of imperialism, which clears the way to the new world order. This view of nationalism corresponds to tactical necessities of the revolution, providing a basis for the collaboration of the "national bourgeoisie" in colonial and semi-colonial countries with the forces of the proletarian revolution. Consequently, the "bourgeois" concept of nationalism is not universally condemned:

This kind of nationalism also has a certain objective historical progressive significance. Due to the fact that the national bourgeoisie of these regions has contradictions with imperialism in the first place, and contradictions with the backward feudal forces of these countries in the second place, and these feudal forces join with imperialism to restrict and damage the development of the national bourgeoisie, therefore the national bourgeoisie of these nations has its revolutionary nature in certain periods of history and to a certain extent. The nationalism of the bourgeoisie of these regions has a certain progressive significance at the time when it mobilizes the masses of the people to rise against imperialism and the forces of feudalism. Therefore, the proletariat should cooperate with this kind of bourgeois nationalism.

Arguing from the principle of necessary revolutionary action, Mao Tse-tung concludes that the "national bourgeoisie" of China¹⁶ can consistently coöperate with the Chinese Communist Party during the democratic coalition phase of the "new democracy," and that at least certain of its elements may be useful allies of the proletariat during the anti-imperialist phase of the struggle.¹⁷ But a watchful eye must be maintained, and safeguards established, to prevent the national bourgeoisie of colonial and semi-colonial countries from sabotaging the proletarian revolution.¹⁸ What

¹⁶ Mao Tse-tung divides the Chinese bourgeoisie into two categories: (1) the "compradore upper bourgeoisie" whose links with "imperialists" and "bureaucratic capitalists" make them enemies of the revolution; and (2) the "national bourgeoisie," a potentially friendly force. The Chinese Revolution and the Chinese Communist Party, Pt. II (D) (ii). In *On the People's Democratic Dictatorship*, Mao defines the rôle of the national bourgeoisie more sharply, indicating specific standards of conduct to be met if that class is to escape treatment as a "reactionary" group.

¹⁷ Both works cited above.

¹⁸ For a typical warning of the necessity for true Communist leadership of colonial revolutionary movements, to avoid the "treachery" of the colonial bourgeoisie, see the comment of one Sha Ping, "The Lesson from Events in Indonesia," broadcast by North Shensi Radio, March 21, 1949: "The reactionary ruling classes of the [Indonesian] Republic dread the anti-imperialist strength of the people, of their own country and of the people of the world. Therefore they not only cannot shoulder the great cause of national liberation, but cannot preserve their 'Republic' from being destroyed by the Dutch aggressors. They have the same outlook as the Nehrus, Jinnahs, Luang Pibul Songgrams, Quirinos, Syngman Rhee and other feeble-minded bourgeoisie of the East. They deem that weak nations cannot attain liberation without relying on imperialism; then, even should they attain 'independence,' they can hardly exist without 'American aid.'"

might be termed a Marxist-Leninist concept of "collective security" renders any menace of "bourgeois-nationalist" treachery in one colonial revolutionary movement a menace to all others. The alliance with the "national bourgeoisie" is subjected by Liu Shao-chi to the condition laid down by Lenin: "that the allies do not hinder us from educating and organizing the peasants and the broad masses of exploited people in the revolutionary spirit."

Thus nationalism and internationalism find their place in the doctrines of Chinese Communism, always faithful to the Marxian dialectic. In ideological content and practical application, they develop to serve the requirements of the proletarian revolution, to enlarge the bonds of interest between all revolutionary movements, and to propagate the crusade against imperialism.

The Major Theses of Foreign Policy

Out of the welter of Marxist-Leninist dialectic it becomes possible, with patience, to identify perhaps six major theses of the foreign policy of the Chinese Communist Party. All stem from the same basic doctrine; all are closely interrelated; together they point to the "correct" solution for all of the problems of foreign policy that arise. Briefly, these six theses may be stated as follows: (1) "imperialism" is the greatest enemy of the Chinese people and the Chinese revolution; (2) the United States, the most advanced capitalist country and the "necessary" leader of the "world imperialist camp," is by nature the major enemy among the nations of the world; (3) the Soviet Union, leader of the states of the "new democracy," whose policies are necessarily antithetical to those of the United States, is the leader of the "world revolutionary front against imperialism," and hence the chief friend of the Chinese people and the Chinese Communist Party; (4) China does not stand alone in her struggle against American "imperialism": while waging her own battle for "Chinese national liberation," China must struggle in common with the "international united front" of all revolutionary and anti-imperialistic peoples; (5) the countries of the "international united front" must resist the counter-revolutionary policies of the "imperialistic states" by a political, economic and ideological counter-attack, waged in a militant, offensive spirit; and (6) incessant struggle must be sustained until the inevitable proletarian victory is complete on all fronts and the foundations of the new world order are firmly secured.

Thesis 1: Anti-imperialism

To Mao Tse-tung, the modern history of China "is nothing but a history of the imperialist invasion of China, of obstruction by it of the path of China's independence and of the hindrances placed by it in the growth of

Chinese capitalism."¹⁹ Accepting Lenin's view that "imperialism is the dying form of capitalism,"²⁰ Mao concludes that in its death-throes capitalism becomes only more rapacious: "Just because of its approaching end, it is feeding more and more upon the colonies and semi-colonies, and is in no way likely to permit the existence of any other capitalist society with a bourgeois dictatorship state" (in colonial and semi-colonial countries).²¹ The efforts of Dr. Sun Yat-sen to liberate China under the slogans of the "old bourgeois-democracy" failed because "bourgeois thought proved too weak during the period of imperialism; it was unable to hold its own against the reactionary alliance of the enslaving thought of foreign imperialism and the back-to-antiquity thought of Chinese feudalism."²² It was only after the "appearance on the political stage of a new force—the Chinese proletariat and the Chinese Communist Party" that there came into being a new culture armed to wage "a new bold offensive against the combined imperialist-feudal cultures."²³

Mao carefully insists that iniquitous imperialism was responsible for much more than mere legalistic derogations of China's sovereignty and independence in external affairs. Imperialist inroads were manifestations of a feudal-imperialist alliance designed to strengthen the resistance of the old order in China to the forces of revolution. It follows that an assault on imperialism is imperative if the domestic social revolution in China is to succeed. Hence, in answering his own question, "Who are the chief enemies of the Chinese revolution at its present stage?" Mao confidently replies:

They are none other than imperialism and semi-feudalism, in other words, foreign bourgeoisie and the Chinese land-owning class, because these two classes are oppressing and retarding the development of the Chinese people. They conspire hand in hand to oppress the Chinese people; and as imperialist oppressions are the severest, imperialists then are the most deadly enemies of the Chinese people.²⁴

The anti-imperialist emphasis in Mao's thinking establishes an ideological cornerstone for his conception of "new democracy." A major thesis of all of his writing since 1937 has been that the Chinese revolution must pass through two stages: (1) the new democratic revolution, and (2) the socialist revolution. During the first stage, the revolution must create "a new democratic society, a new state of the combined dictatorship of all revolutionary classes,"²⁵ which is still quite distinct in prin-

¹⁹ On New Democracy, p. 76.

²⁰ The reference is doubtless to Lenin's "Imperialism," in V. I. Lenin, *Selected Works* (Moscow, 1946), Vol. I, esp. pp. 737-739.

²¹ On New Democracy, p. 76.

²² *Ibid.*, p. 85.

²³ *Idem.*

²⁴ Mao, *The Chinese Revolution* . . . , Pt. II (B).

²⁵ On New Democracy, p. 71.

ciple from an exclusive dictatorship of the proletariat.²⁶ The successful establishment of this new democratic system of the first stage is a necessary pre-condition for the transition to the socialist society of the second stage. Mao's thought is very clear: "Only in the realm of Socialism can China become prosperous, yet the present is no time to practice it. Socialism is out of the question before the tasks of the present revolution, the tasks of anti-imperialism and anti-feudalism, are fulfilled."²⁷

According to this Chinese interpretation of Marxism-Leninism, imperialism is no mere superficial incident but is the very root evil of Chinese social life. "Feudalism" is also a target of Communist policy during the new democratic stage, but it is considered as an indigenous problem to be liquidated by domestic social policy once the inhibitions of imperialism are conquered. Since it is anticipated that the imperialists will do all that is possible to support resistance to the growth of the new democracy, there can be no compromise with them.²⁸ This is a result of the Marxist-Leninist interpretation of "imperialism" as a form of social behavior characteristic of advanced (and decaying) capitalist societies. Such imperialism aspires to exploit the proletariat, to accumulate wealth, to establish direct or indirect control over less developed peoples and to provoke the competitive struggles which lead to war.²⁹ By exposing these facets of its behavior,

²⁶ A working distinction between the dictatorship of the proletariat and the political leadership of the proletariat during the period of the new democracy is given in the Central Committee's Foreword to a reprint of Chapter 2 of Lenin's *Left Wing Communism*: "The historical difference between the contents of the proletarian dictatorship and the people's democratic dictatorship is that our people's democratic dictatorship is under the leadership of the proletariat. . . . The political and social aim of this revolution is not the overthrow of the capitalists in general, but to establish a new democratic society and a coalition dictatorial country of the various revolutionary classes. The proletarian dictatorship aims at overthrowing capitalism and establishing Socialism. Therefore . . . we must differentiate between the existing conditions of Lenin's period and that of our present period." North Shensi Radio, June 11-12, 1948.

²⁷ On New Democracy, p. 78.

²⁸ Mao Tse-tung was highly explicit on this point in his remarks to the Preparatory Committee of the New Political Consultative Conference on June 15, 1949: "I think it is necessary to call your attention to the fact that the imperialists and their running dogs, the Chinese reactionaries, will not take their defeat in this land of China lying down. They will still work in collusion with each other and use all possible means to oppose the Chinese people. They will, for example, send their lackeys to penetrate into China to carry out work of disintegration and disruption. This is inevitable and they will certainly not forget this work. . . . Furthermore, if they chose to be adventurous, they may even send part of their armed forces to encroach on China's frontiers, a possibility which cannot be ruled out. . . . We must decidedly not, because of our victories, relax our vigilance toward the wild retaliatory plots of imperialist elements and their running dogs." China Digest, Vol. 6, No. 6 (June 28, 1949), p. 4.

²⁹ Liu Shao-chi offers a characteristic statement of these relationships in "On Internationalism and Nationalism," *loc cit.*, note 15, *ante*:

imperialism is invoked as a self-destroying instrument which forges fraternal ties between the proletariat within the capitalist countries and the downtrodden and oppressed peoples of all colonial and semi-colonial countries. The anti-imperialist crusade has been an unmistakably potent force in recent Chinese political history. The Chinese Communists are convinced that there can be no abatement of this crusade, and that the unequivocal execution of the anti-imperialist program is essential if the broad masses of Chinese people, disposed by temperament and tradition to be non-Communist, are to become loyal and faithful to the leadership of the Communist Party.

That China is, in fact, a semi-colonial country, reduced to an inferior status by the operations of imperialism, is a cardinal principle of the Chinese Communist faith. The impact of imperialism is always measured in terms of social forces and social consequences, never in terms of the legality of the methods and techniques of diplomacy admitted by the prevailing ethics of the international law of the time. In *The Chinese Revolution and the Chinese Communist Party* (1939), Mao formulated a comprehensive and persuasive indictment of the political, economic and cultural devices employed by the imperialist states "to gradually turn China into their semi-colony and colony," concluding:

. . . on the one hand, the imperialistic invasion of China had broken up the Chinese feudal society, paving the way for capitalism in China, and turning the old feudal society into a semi-feudal society, while on the other hand, it has oppressively dominated China, reducing China from an independent state into a colony and semi-colony.³⁰

Thesis 2: American Enmity

From the entire line of Chinese Communist dialectic—as from Marxism-Leninism, generally—it follows that the United States, as the leading "imperialist" Power, must also be the chief natural enemy of the states of the "new democracy." This enmity is so vibrant and controlling that the isolation and defeat of the United States becomes the most pressing urgency in the field of Chinese Communist foreign policy.

The world is divided: On the one hand are the "reactionaries of the various countries"—"American imperialism and its stooges in the various countries of the world."³¹ On the other hand is the "world anti-

"The class interests of the bourgeoisie are founded on capitalist exploitation, pursuing ever higher and higher profits, exploiting hired labor, and within its own ranks carrying on mutual competition, squeezing out, exerting pressure on and swallowing up competitors and waging wars and world wars—thus utilizing every possible method to seek monopoly throughout the country and the world—such is the profit-seeking nature of the bourgeoisie. This is the class basis of bourgeois nationalism, and likewise the class basis for all bourgeois ideologies."

³⁰ Part I(O).

³¹ Lu Ting-yi, "Explanation of Several Basic Questions concerning the Postwar International Situation," *Emancipation Daily*, Jan. 6, 1947, broadcast serially over Yenan Radio beginning Jan. 7, 1947. Lu Ting-yi, Editor-in-Chief of *Emancipation Daily*, and

imperialist camp" comprising "the Soviet Union and the new democratic countries of Eastern Europe, the national liberation movements of China, the countries of Southeast Asia and Greece, and the people's democratic forces in all countries."³² The forces of "imperialism" are at once the forces of "anti-democracy," "war-mongering," "reaction," "feudalism," "fascism" and all other synonyms for the forces of darkness and evil. The opposing forces of "anti-imperialism" are at once the forces of "democracy," "freedom," "peace," "anti-fascism," "progress," "anti-feudalism" and all other synonyms for the forces of light and virtue.

As early as April 24, 1945, Mao Tse-tung predicted that "struggles between anti-fascist peoples and the remnant fascist forces, between democratic and anti-democratic forces, will go on in most parts of the world" after the close of World War II.³³ By January, 1947—even before the Truman Doctrine and the Marshall Plan—the United States was indelibly identified with the fascist camp against which the "democratic" and "anti-imperialist" forces must wage a bitter, militant struggle: "American imperialist groupings have replaced the fascists of Germany, Italy and Japan, becoming world aggressors."³⁴ Lu Ting-yi was even more specific:

After World War II, American imperialists took the place of fascist Germany, Italy and Japan, becoming the fortress of the world reactionary forces. . . . The reactionaries of all countries and the fascist remnants have now all become traitors, directly or indirectly supported by American imperialism, selling out the people of all countries.³⁵

Chief of the Propaganda Department of the Chinese Communist Party, was also one of the Communist negotiators for a peaceful domestic settlement following the close of the first Political Consultative Conference, January, 1946. Lu includes among the "stooges" Britain's Churchill, France's De Gaulle, China's Chiang Kai-shek, who are closely associated in his view with the "fascist remnants": Spain's Franco, Germany's von Papen and Schacht, and the Japanese cabinet of the day.

³² Liu Shao-chi, *op. cit.*

³³ On Coalition Government, Part II.

³⁴ New Year's editorial of the New China News Agency for 1947, broadcast over North Shensi Radio, Dec. 31, 1946.

³⁵ *Loc. cit.*, note 31, *ante*. Mao Tse-tung brought the charge up to date as of Nov. 1, 1948: "Instead of fascist Germany, Italy and Japan, it is now American imperialism and its servants in the various countries who are feverishly preparing a new world war and who are menacing the whole world." *Loc. cit.*, note 12, *ante*.

Lu Ting-yi reaches his conclusion by arguing that American "monopoly capital experienced tremendous growth during the war," when American industrial production doubled. American monopoly capitalists, warlords and militarists advocated an aggressive postwar policy to expand markets, take over the markets of other capitalist countries in the colonies and semi-colonies, and to exercise "sole domination" over Japan and Latin America. Because American productive technique is very high and American monopoly capital tremendous, the United States can gain an overwhelming advantage over all possible competitors through innocent-appearing "open door" and "equal opportunity" arguments. Since the United States prepares large-scale military undertakings and operates bases throughout the world, it dominates all of the other imperialist Powers, making them captives of American policy.

The United States is the implacable enemy not only because she has inherited the mantle of fascism in leading the assault of "world reactionaries" against the democratic peoples of the world. In addition, as the leading "imperialist" country, the United States personifies all of the vicious evils of the imperialist system. In the three years between 1946 and 1949, only the exceptional statement of Chinese Communist policy neglected to brand the United States, along with the "bandit" Chiang Kai-shek and the "reactionaries" of the Kuomintang, as the special enemy of the Chinese people. In a more specific sense, the United States was represented as succeeding to the aggressive Japan of 1937-1945, taking her place as the direct menace to the continuing independence and integrity of China. All of the vituperation poured upon Japan during the war years has been turned against the United States.

Immediately after the signing of the new Sino-American commercial treaty on November 4, 1946, *Emancipation Daily* charged that it was an "extremely unequal" treaty under which "American imperialism can at will do what it wants on the Chinese territory as if in the home country," depriving China entirely of "her sovereignty over her customs and coastal and inland navigation rights."³⁶ Again it was left to Lu Ting-yi to pass the most sweeping condemnation:

There is no difference in nature between the policy of American imperialism toward China and the policy of Japanese fascists toward China, although there are differences in form. The venomous treachery of means employed by American imperialism, however, surpasses that of Japanese imperialism. . . . The self-defense war now being waged by the Chinese people against Chiang Kai-shek and American imperialists is in its nature a war for the motherland. It is an all-national war obtaining the support of the entire nation.³⁷

This will be recognized as the propaganda line of the anti-Japanese war, with only a substitution of names. It was the logic employed between 1937 and 1945 to arouse national enthusiasm for the crusade against Japanese aggression and to establish the political basis for the domestic united front. By interpreting the civil war against Chiang Kai-shek—the "running dog of American imperialism"—as a Chinese war of self-defense against external aggression, the same logical appeal was perpetuated in

³⁶ Nov. 27, 1946. Objectively, this statement is palpably false.

³⁷ *Op. cit.* The declaration of the Central Committee of the Party on Nov. 21, 1948, actually constitutes a conditional declaration of war upon the United States, laying a basis for reparations to be claimed from the United States:

"The Communist Party of China holds that any military or economic aid to the Kuomintang Government by the Government of the United States or other countries constitutes an act of hostility against the Chinese nation and the people of China, and should cease immediately. If the American Government should dispatch its armed forces for either all-out or partial protection of the Kuomintang Government, this would constitute armed aggression against the sacred territory and sovereignty of China. All the consequences thereof would have to be borne by the American Government."

support of a Communist-led united front in defense of the Chinese motherland. Communist enmity for the United States was thus a central issue of Chinese domestic politics after 1946.

The Chinese Communists do not impute to the United States aggressive designs which are limited to China and the Chinese people alone. The United States, supporting "imperialism" and "reaction" in China, is seen as acting in the only possible way in which the leading imperialist Power of the world could act toward the peoples of *all* colonial and semi-colonial countries. China thus suffers in common with all "democratic, anti-fascist" peoples; she must never ignore the identity between her own interests and those of all oppressed peoples.³⁸ Perhaps because the connivance of American "imperialism" with the reactionary and traitorous Chiang Kai-shek has "plunged the people of all China into an abyss of suffering,"³⁹ China may feel entitled to assume the leadership of all Asiatic peoples in their common struggle against American "imperialism."⁴⁰

Finally, American "imperialism" is considered to expose China and all other nations to the menace of a new world war:

A grave economic and political crisis exists and moreover grows ever greater day by day within the entire imperialist camp. The international reactionaries headed by American imperialism are dreaming to find a way out of this crisis through war. Hence the danger of a new world war exists. All lovers of peace in the world must unite together to struggle against this danger of a new war.⁴¹

Thus we arrive, not unexpectedly, at a point where the Chinese Communists contend that "the immediate central task before the peoples and democratic forces of all countries is to struggle for the realization of a world wide united front and the united front within each country."⁴²

The depth and intensity of the animosity of Chinese Communists for the United States should not be underestimated or lightly cast aside. It derives from impassioned adherence to a Marxist-Leninist view of the

³⁸ Statement of a "spokesman" of the Central Committee of the Chinese Communist Party, North Shensi Radio, Feb. 22, 1948.

³⁹ Mao Tse-tung, "Statement on the Current Situation," North Shensi Radio, Jan. 14, 1949.

⁴⁰ *Infra*, pp. 89-90.

⁴¹ New China News Agency editorial, "Peace Forces of the World Mobilize and Shatter the Plot of War Provocateurs," North Shensi Radio, March 18, 1949.

⁴² Lu Ting-yi, *op. cit.*, reasons thus: "The world anti-democratic forces are American imperialists and reactionaries in the various countries. Since the world anti-democratic forces are in unison attacking the American people, peoples of various capitalist countries, colonies and semi-colonies, the peoples of America, of various capitalist countries, colonies and semi-colonial countries must act in unison to form a worldwide united front against American imperialism and reactionaries in all countries. This worldwide united front, this colossal army comprising well over one billion people, is precisely the world democratic might. . . . This united front will undoubtedly have the sympathy and moral support of the Socialist Soviet Union."

world in which there is no room for a detached or objective evaluation of the actual content of American foreign policy. The Chinese Communists are forced by their own dialectic into an intransigent anti-Americanism that must continue to motivate their policy toward the United States during the stage of the "new democracy" and the ensuing phases of Socialism-Communism.

Thesis 3: Soviet Friendship

The Chinese revolution, prior to 1917, is considered by Chinese Communists to have been an "old-type bourgeois-democratic" revolution, which changed its character as a result of the "establishment of a Socialist state on one-sixth of the land surface of the globe, i.e., after the Russian revolution of 1917," and now "forms a part of the world proletarian Socialist revolution."⁴³ During World War II "the Soviet people . . . created a mighty force which was mainly responsible for the defeat of fascism."⁴⁴ To repay the Soviet Union for its mighty services, the Chinese Communist Party demanded in 1945 that the Kuomintang "desist from taking a hostile attitude toward the Soviet Union and improve the Sino-Soviet relationship."⁴⁵ Thereafter the Chinese Communist Party has steadfastly expressed admiration for the Soviet Union, endorsed the general line of its domestic and foreign policy, emphasized its important contributions to the cause of the Chinese revolution, and supported its leadership of the postwar worldwide united front against the United States and the "forces of world imperialism."

It is a necessary principle of conduct based on Marxism-Leninism that the policy of the Soviet Union be supported as the policy of a state which is, in the very nature of things, incapable of following an imperialist, aggressive or expansionist policy. Liu Shao-chi thus finds it possible to characterize as "the utterly groundless demagogic propaganda and vicious slanders of the imperialist bourgeoisie" the allegations that "the Soviet Union is a red imperialist," that "the Soviet Union conducts aggression against China, Korea and other nations," and that "the Soviet Union is carrying out an expansionist policy."⁴⁶ It is as impossible for the Soviet

⁴³ Mao Tse-tung, *On New Democracy*, pp. 70-72, esp. p. 70.

⁴⁴ Mao Tse-tung, *On Coalition Government*, Pt. II. It is made to appear that the Soviet Union was chiefly responsible for the defeat of Germany, while it is left to the Anglo-American-French forces to batter "the remnants of Hitler's hordes."

⁴⁵ *Ibid.*, Part IV(B) (x).

⁴⁶ *Op. cit.* *Hsin Hua Jih Pao* (Chungking) painted an alluring picture of Soviet policy in its issue of Feb. 23, 1945. In answering the question "Why do the Russian people hold such decisive power?" that Communist organ held: "They are simply the outcome of the realization within their country of the most perfect democratic system in the world. Every member of the vast population of the Soviet Union has become the master of the state, living freely and happily, as it were, in the larger family of democracy. The spirit as well as the principles of democratic unity pervades all the domestic and foreign policies carried out by the Soviet Union."

Union to follow an imperialist policy as it is impossible for the United States to follow any other policy.

There is little evidence that the Soviet Union specifically directs the course of the Chinese revolution or controls the foreign and domestic policies of the Chinese Communists. Serious errors in American policy are thus likely to result if that policy seeks primarily to separate Chinese Communism from Soviet Communism. The two are already separate, if parallel. A review of some three decades of Chinese Communist history must lead to the conclusion: (1) that the movement is largely indigenous to China—although inspired by Marxist ideology; (2) that those who direct its affairs are Chinese—of whom an influential minority has had Soviet training; (3) that its recent successes can be explained most satisfactorily by the disintegration of the Kuomintang and the shrewd marshaling of its own political and military forces to hasten that end; and (4) that Chinese Communism is capable of surviving over an extended period of time on its own resources, unless China should become involved in a new world war, or the object of an external intervention supported by overwhelming military might and fully committed to its destruction.⁴⁷ Chinese and Soviet Communist policies, attitudes and doctrines are closely correlated—the evidence of this leaves no room for doubt. But in a situation where Moscow finds it unnecessary to issue precise directives to Peking, a more accurate and realistic judgment would be that Chinese Communism derives its maximum support from the Soviet Union in the form of intellectual inspiration, paternalistic sympathy and the broad cover of Soviet world policy. Marxism-Leninism forms their basically identical foreign policies into a monolith resting on mutual friendship and common interest.

The thesis of Soviet friendship is a doctrinal product of all the other theses of Chinese Communist foreign policy. It is now necessary only to illustrate the friendly attitude of the Chinese Communists toward the Soviet Union on the basis of practical experience:

(1) At no time has the Chinese Communist Party taken hostile cognizance of the Soviet despoliation of the industrial establishments of Manchuria in 1945–1946.⁴⁸ When students in Chungking conducted anti-Soviet demonstrations on February 22, 1946, in protest against the Soviet demands on Manchuria, *Emancipation Daily* declared that they had “unfortunately been led astray by false propaganda disseminated by fascist elements in China,” and that they would some day come to realize “that real love of country lies not in being anti-Soviet Union or anti-Communist

⁴⁷ The present writer's judgment that Chinese Communism has a substantial viability does not mean that he subscribes to proposals for military intervention.

⁴⁸ This conclusion is drawn from a review of the extensive Communist literature on Manchuria, where the Northeast Liberated Area has been concerned since 1946 with innumerable problems of agricultural and industrial policy; no suggestion has been encountered that problems or handicaps have arisen in these respects from Soviet policy.

but in joining hands with the Soviet Union and the Chinese Communist Party."⁴⁹

(2) No protest has been registered against the continued presence in unlimited numbers of Soviet forces on Chinese territory—in Dairen and Port Arthur—even though, in every objective sense, this is an apparent derogation of China's sovereignty.

(3) Chinese Communist propaganda organs have faithfully repeated the propaganda claims of Moscow relating to successes of Sovietization within the Soviet Union.⁵⁰

(4) The great feast-day of Soviet Communism, the annual celebration of the October Revolution, never passes without laudatory congratulation from Communist China. In their telegram of November 5, 1948, Mao Tse-tung and Chu Teh joined in congratulating Stalin "upon the prosperous growth of the Soviet Union, which is the bulwark of international peace and democracy, and the close coöperation between the Chinese and Soviet peoples."⁵¹

(5) The Chinese Communist Party rushed to the assistance of the Communist Party of the Soviet Union in the *affaire Tito*. On July 10, 1948, the Central Committee of the Chinese Communist Party adopted a special resolution expressing complete agreement with the Cominform resolutions directed against Tito.⁵² The Cominform conference and its resolutions were seen as

duties which international Communists should perform for the sake of defending Marxist-Leninist principles and the revolutionary cause of the working class in the world and the peoples of all countries; they are duties which should be performed for the sake of defending the cause of world peace and democracy and defending the people of Yugoslavia from the deception and aggression of American imperialism.

Tito and his associates were chastised for their "treacherous and erroneous internal and external actions" which violated the "basic viewpoints of Marxism-Leninism." "International elements" within the Yugoslav

⁴⁹ Feb. 25, 1946, as broadcast by Yanan Radio, Feb. 26, 1946, continuing: "We believe that the Soviet Union is certainly willing to overcome difficulties swiftly . . . [and that] economic negotiations will not violate the Sino-Soviet Treaty."

⁵⁰ A characteristic group of assertions was broadcast by New China News Agency over North Shensi Radio on Nov. 7, 1948, including these: (1) "All traces of poverty and ignorance have been eliminated from the countryside of the Soviet Union . . ."; (2) "A new world record in iron production has been set by Soviet iron workers"; (3) "The Soviet Union is undertaking large-scale production of artificial rubber motor tires . . . much superior to those made in the United States." Also see note 46, *ante*.

⁵¹ North Shensi Radio, Nov. 7, 1948. A similar message had been transmitted the year before, North Shensi Radio, Nov. 6, 1947.

⁵² Full text broadcast by North Shensi Radio, July 11, 1948. At that time, the Chinese Communist Party was itself launched upon a thorough-going purge to reorganize and "purify" its own ranks.

Communist Party were exhorted to "resolutely rise up to correct the mistakes of the Tito bloc, so that the Communist Party of Yugoslavia will again travel along the path of Marxism-Leninism and proletarian internationalism." The entire question was raised for careful study by the *cadres* of the Chinese Communist Party since it was "no accidental, isolated phenomenon; it is a reflection of the class struggle in the revolutionary ranks of the proletariat."

(6) On the international propaganda front, the Chinese Communists endorsed the "stern refutation" of charges of Nazi-Soviet complicity in 1939-1941, as formulated in the Soviet publication, *Falsifiers of History*.⁵³ A strong delegation from Communist China took part in the Soviet-sponsored "World Congress for Peace" in Prague, April 20-25, 1949.⁵⁴ Mao Tse-tung joined with representatives of nine associated political parties and groups on April 3, 1949, to denounce the North Atlantic Pact as a menace to "the peace and security of mankind," and to declare that they would "adopt the necessary means and march forward hand in hand with the ally of China, the Soviet Union, and the other world forces of peace and democracy in a determined struggle against the instigators of an aggressive war."⁵⁵

Theses 4: The International United Front, and Thesis 5: The Communist Offensive

Revealing and significant light on the foreign policies of Chinese Communism is shed by the prevailing analysis of the status of the world-wide revolutionary struggle. Chinese Communists no longer speak of the "capitalist encirclement"—and, curiously enough, little of this old complaint is heard in the Soviet Union today. "Capitalist encirclement" reflected a defensive mentality; it loses much of its value when Communist forces undertake the initiative. The *rationale* of this new initiative has been developed by Lu Ting-yi,⁵⁶ whose authoritative views may be compressed and paraphrased as follows:

The "dominant political contradiction" of the postwar world is not between the capitalist world and the Soviet Union, or between the United States and the Soviet Union, but between the "democratic and anti-democratic forces of the capitalist world." The inherent contradiction "between American monopoly capital and warlords on the one hand and the Socialist Soviet Union on the other" still persists,

⁵³ North Shensi Radio, Feb. 21, 1948; *Nazi-Soviet Relations, 1939-1941* (Washington, 1948).

⁵⁴ Although Chinese Communist Party members were in a numerical minority in the large Chinese delegation of 40 members.

⁵⁵ New China News Agency from Peip'ing, April 3, 1949; text in *China Digest*, Vol. 6, No. 1, April 19, 1949, p. 2.

⁵⁶ *Loc. cit.*, note 31, *ante*.

but "is not an urgent contradiction." Naturally, because the Soviet Union is now so strong and renders such important services as "the protector of world peace, American and world reactionaries do bitterly hate the Soviet Union and, moreover, want to carry on the anti-Soviet struggle." But the "social and state system of the Soviet Union is much more strong and stable than that of American capitalism," and since there are "no anti-democratic forces" within the Soviet Union "there is no internal struggle [there] between democracy and anti-democracy." Thus the American imperialists cannot successfully engage the struggle until they "have brought into submission the people of America, the people of the various capitalist countries, colonies and semi-colonies"—and "to bring them into submission is impossible." For this reason, the American-Soviet contradiction is subordinated to the "contradiction" between the democratic and anti-democratic forces within the capitalist world, and need never give rise to conflict or war so long as the capitalist-imperialists remain incapable of bringing the democratic forces of their own countries (and dependent areas) under submission.

The reactionaries within the imperialist camp are actually few in number and they are rapidly losing their strength. The overwhelming power, greed and domination of American capitalism⁵⁷ create conflicts in the imperialist countries. So weakened are the "reactionaries" in non-American imperial-colonial states—the Churchills and De Gaulles, for example—that they have been obliged to rely upon American imperialism in order to repress the democratic elements in their own countries and to resist the independence movements of their colonial and semi-colonial peoples. Hence, the "American imperialistic policy of aggression on all capitalist countries must of necessity arouse the opposition of those countries," must force their popular elements to organize for resistance against reactionary treachery. This tendency extends even to the people of the United States, where "enlightened members of the American bourgeoisie, represented by Wallace, will certainly rise for a determined struggle with the reactionaries." A broad world democratic front comes into existence, with the strong and stable Soviet Union as "the main pillar," consisting of "broad masses of American people, broad masses of people of all capitalist countries beside America, and broad masses of people of all colonial and semi-colonial countries"—including the peoples of Asia and Latin America. All are aroused to struggle for a common cause. Consequently, "there are no grounds . . . for the so-called 'capitalist encirclement of the Soviet Union.'" On the contrary, because the Soviet Union adheres to "peaceful democratic international policies and policies of peaceful competition and friendly commerce with all countries," and also because England, France and other countries "to resist American oppression, escape blows of economic crisis and furthermore restore their economies" must coöperate and trade with the Soviet Union, "the so-called capitalist encirclement therefore does not exist."

In this "worldwide united front" of the democratic forces of all countries, the democratic forces of the capitalist countries associate themselves with the leadership of the Soviet Union. As the struggle

⁵⁷ See note 35, *ante*.

proceeds, it becomes apparent that the forces of world reaction, "outwardly strong but hollow inside," are becoming "daily more isolated." The disordered reactionary forces, dismayed by the confidence of the democratic forces, must resort to terror: "Their fanatical oppression of the people, their horror of the truth, their complete reliance on lies for a living—these are all manifestations of their complete loss of confidence." If the issue seems doubtful at times, the inevitable economic collapse of the United States, which "cannot but be extremely turbulent in nature," will open the eyes of all doubters to the nature and feebleness of the reactionaries and will stimulate the masses to greater resistance and victory.⁵⁸

Chinese Communism naturally identifies itself as a leading component of the democratic united front against imperialism.⁵⁹ The aggressive struggle of the "democratic forces" against the "forces of imperialism and reaction" is also a truly militant struggle which no longer admits the possibility of neutrality. Mao Tse-tung has been highly explicit on this point:

Has not the history of the past thirty-one years of Soviet power proved how completely false and bankrupt is the so-called "middle way," the so-called "third path" which, to deceive the working people is so loudly proclaimed by all those who do not like Marxism and who hate the Soviet Union—the socialist fatherland of the working people of the world—by all those who are trying to maintain some kind of intermediate position between the counter-revolutionary front of the imperialists and the revolutionary front against imperialism and its lackeys in all countries? ⁶⁰

An Asiatic Cominform?

After nine Eastern European Communist parties established the Cominform in September, 1947, Mao Tse-tung quickly undertook to proclaim that this was a desirable principle for Asia. Characterizing the manifesto of the Cominform as "a summons to battle," Mao declared: "All anti-imperialist forces of the various Oriental countries should also unite to oppose the oppression of imperialism and the reactionaries within each country, taking as the objective of their struggle the liberation of more than one billion oppressed people of the East."⁶¹ There is no present evidence

⁵⁸ In *The Present Situation and Our Tasks*, Pt. VIII, Mao Tse-tung warns Chinese "reactionaries" against undue reliance on American economic strength: "The economic strength of American imperialism . . . has met with the unstable and daily-shrinking domestic and international market. Further shrinking of this market will lead to the outbreak of economic crisis. American war prosperity is merely a momentary phenomenon. Its strength is only superficial and temporary. Crisis, like a volcano, daily menaces American imperialism; American imperialism is sitting right atop this volcano."

⁵⁹ New China News Agency editorial, North Shensi Radio, Nov. 8, 1947.

⁶⁰ Nov. 1, 1948, *loc. cit.*, note 12, *ante*.

⁶¹ *The Present Situation and Our Tasks*, Pt. VII.

that an Asiatic Cominform is actually in operation, but the Chinese Communist Party has assumed the rôle of leader and sponsor for all Communist-type national revolutionary movements in Asia. (1) Chinese Communists offer free advice on revolutionary tactics to the leaders of such movements:

In other colonial and semi-colonial countries, like India, Burma, Siam, the Philippines, Indonesia, Viet Nam, Southern Korea and others, it is likewise necessary for the Communists in order to defend the interests of their own nation to adopt firm policies against the national betrayal of that section of the bourgeois reactionaries (mainly the big bourgeois reactionaries) which has already capitulated to imperialism. . . . On the other hand, Communists should establish anti-imperialist coöperation with the national bourgeoisie who still oppose imperialism and do not oppose the rising of the masses of people for anti-imperialist struggles.⁶²

(2) In specific cases, they sound warnings against national revolutionary leaders whose identification with Communist interests is doubtful. In the case of Indonesia, for example, the "disgraceful" Renville Agreement (January, 1948) was seen to result from the "vacillation of upper elements within the country," and Soekarno was doubtless the unnamed target of the charge that "American imperialists . . . buy up Indonesian reactionaries to split the Indonesian national camp."⁶³ (3) Generally, the line of Mao Tse-tung, Liu Shao-chi and Lu Ting-yi supplies the advanced ideological explanation of the practical necessities of revolutionary action in the Oriental environment, supplementing whatever direct or indirect guidance Moscow may offer the leaders of Asiatic revolutionary movements.

Thesis 6: The Proletarian World Victory

This is only the plausible consequence of the Marxist-Leninist perspective underlying the other five theses, and is implicit throughout the entire argument. We have the word of Mao Tse-tung that the struggle is one the proletarian forces can win:

The enemy's basis in his own camp is unstable; it is a camp divided. The enemy is isolated from the people. He is faced with an economic crisis which imperialism is incapable of averting. That is why the imperialist camp can and will be vanquished. . . .

We know that many difficulties lie ahead, but we do not fear them. . . . Our path is lighted by the October Revolution. . . . The struggle of the Chinese Revolution, isolated in the past, is now, after the victory of the October Revolution, isolated no longer. We have the support of Communist Parties and of the working class throughout the world.⁶⁴

⁶² Liu Shao-chi, *op. cit.*

⁶³ New China News Agency message to the Southeast Asia Youth Conference, North Shensi Radio, Feb. 16, 1948. See also note 18, *ante*.

⁶⁴ *Loc. cit.*, note 12, *ante*.

III. CHINESE COMMUNIST FOREIGN POLICY IN ACTION

1. *Establishment of Diplomatic Relations*

Prior to the establishment of the Central People's Government on October 1, 1949, the Chinese Communists had no facilities for maintaining diplomatic relations with foreign states. Nevertheless, they frequently made clear their position on this question in anticipation of the final consolidation of power. On November 21, 1948, for example, a declaration of the Central Committee of the Chinese Communist Party announced that:

the Communist Party of China, the People's Democratic Governments of China's Liberated Areas and the Chinese People's Liberation Army are willing to establish equal, friendly relations with all foreign countries including the United States. . . . But the integrity of China's territory and sovereignty must be preserved without encroachment.⁶⁵

Several months later, on April 30, 1949, General Li Tao, "spokesman" for the headquarters of the People's Liberation Army, stated that "the Chinese People's Revolutionary Military Committee and the People's Government are willing to consider the establishment of diplomatic relations with foreign countries" under the condition that "these relations should be established on the basis of equality, mutual benefit and mutual respect for each other's independence and integrity of national sovereignty" and that foreign governments willing to consider the establishment of diplomatic relations "must sever their relations with remnant Kuomintang forces and withdraw their armed forces from China."⁶⁶

No serious effort was made to implement these early declarations, most probably because the question of future constitutional arrangements was under study and the inappropriateness of acting through the Party, the Army or the regional governments of the various liberated areas was recognized. They had an immediate propaganda value, however, and were important preliminaries to the definitive statement of policy incorporated into the "common program" adopted by the Chinese People's Political Consultative Conference on September 29, 1949:

The Central People's Government of the People's Republic of China may negotiate and establish diplomatic relations on the basis of equality, mutual benefit and mutual respect for territory and sovereignty with foreign governments which sever relations with the Kuomintang reactionaries and adopt a friendly attitude toward the People's Republic of China.⁶⁷

⁶⁵ North Shensi Radio, Nov. 21, 1948.

⁶⁶ New China News Agency, Peip'ing Radio, April 30, 1949; text in *China Digest*, Vol. 6, No. 3 (May 17, 1949), p. 5.

⁶⁷ Art. 56, *loc. cit.*, note 4, *ante*. In this final form, the "common program" expressed in more conservative language the statement made by Mao Tse-tung to the Preparatory Committee of the CPPCC on June 15, 1949: "We wish to declare to the

In this context, it is clear that the establishment of diplomatic relations is subject to *negotiation*. Such negotiation would require the acceptance by foreign Powers of a number of different conditions: (1) By demanding that "the integrity of China's territory and sovereignty must be preserved without encroachment," the Central Committee in effect warned that no division between Communist- and Kuomintang-held China would be tolerated, and that such areas as Formosa could not be excluded from the jurisdiction of the Chinese Communists;⁶⁸ (2) The Central Committee's promise to protect "the *rightful* interests of all nationals of foreign countries in China, including American nationals"⁶⁹ clearly implied that existing treaties defining the rights of foreign nationals would need to be reconsidered; (3) By proposing to establish diplomatic relations "on the basis of equality, mutual benefit and mutual respect for territory and sovereignty," a protest was registered against existing arrangements by which "imperialist" Powers had, in the view of the Chinese Communists, nullified their agreements to abandon extraterritorial and unequal privileges; (4) "Relations with the Kuomintang reactionaries" must be severed; and (5) The adoption of a "friendly attitude" toward the People's Republic would entail some guarantee of "sincerity."⁷⁰

While these conditions might create difficulties for the Western Powers, especially the United States, they did not prove embarrassing for states in the Soviet sphere whose ideological affinities with Chinese Communism set all doubts at rest. As his first official act, Foreign Minister Chou En-lai on October 1, 1949, communicated Mao Tse-tung's proclamation of that date to consulates in Peking and embassies and legations in Nanking for transmission to their respective governments, with an expression of his belief "that the establishment of normal relations between the People's Republic of China and countries in the world is necessary." Within twenty-four hours he was informed by the Soviet Government of its "decision to establish diplomatic relations." Within the next four days, nearly identical notes were received from seven other states in the Soviet sphere—Bulgaria and Rumania (October 3), Hungary and (Northern)

whole world: we only oppose the imperialist system and its conspiratorial scheme against the Chinese people. We are willing to negotiate for the establishment of diplomatic relations with any foreign government on the basis of principles of equality, mutual benefits and mutual respecting of territorial sovereignty provided it is willing to sever relations with the Chinese reactionaries and cease to help or work in collusion with them and provided it adopts a real, and not hypocritical, attitude of amity toward the China of the people." *China Digest*, Vol. 6, No. 6 (June 28, 1949), p. 4.

⁶⁸ "The task of the Chinese people's liberation struggle is to liberate all China up to the liberation of Taiwan, Hainan Island, and the last inch of territory belonging to China." *New China News Agency*, North Shensi Radio, March 16, 1949.

⁶⁹ From the Central Committee declaration of Nov. 21, 1948. *Italics added.*

⁷⁰ See Mao Tse-tung, note 67, *ante*.

Korea (October 4), Czechoslovakia and Poland (October 5) and Mongolia (October 6).⁷¹

Shortly after the Communists took over the Tientsin-Peking area in January-February, 1949, it was made clear that the diplomatic and consular personnel of governments with which relations had not been regularized would be treated as private citizens. The treatment accorded to American Vice Consul William O. Olive in Shanghai in July, 1949, and the treatment of Consul General Angus Ward in Mukden in October and November, 1949, also made clear that the familiar *de facto* consular privileges that had developed over years of practice in China were now finally at an end. According to the Chinese press, even the American Ambassador, Dr. J. Leighton Stuart, was required "like any foreign national" to arrange in person for his exit visa and to post two shop guarantees before he was permitted to return to the United States.^{71a}

2. *Attitude Toward Existing Treaties*

As early as February 1, 1947, the Central Committee of the Chinese Communist Party issued a "Declaration Concerning Certain Foreign Loans and Agreements Negotiated by the Kuomintang Government." Reciting that the Kuomintang Government had, since January 10, 1946, concluded a number of important diplomatic negotiations with certain foreign governments which were "completely contrary to the will of the Chinese people and . . . have plunged and will continue to plunge China into civil war, reaction, national disgrace, loss of national rights, colonialism and to ultimate crisis in chaos and collapse," the Central Committee declared:

This Party will not now nor in the future recognize any foreign loans, any treaties which disgrace the country and strip it of its rights, and any of the above-mentioned agreements and understandings entered into by the Kuomintang Government after January 10, 1946, nor will it recognize any future diplomatic negotiations of the same character which have not been passed by the Political Consultative Conference or which have not been agreed to by this Party and other parties and groups participating in the Political Consultative Conference. This Party furthermore will absolutely not bear any obligations for any such loans, treaties, agreements or understandings.⁷²

⁷¹ Full texts of the notes exchanged with these countries are given in China Digest, Vol. 7, No. 2 (Oct. 19, 1949), pp. 19-22.

^{71a} *Wen Hui Pao* (Shanghai), Oct. 24, 1949.

⁷² Jan. 10, 1946, was taken as the cut-off date because it marked the opening of the original all-party Political Consultative Conference which was asserted by the Central Committee to have been "universally recognized by the people of the entire country and other world powers as constituting the highest political body in China." From this inexact premise the Chinese Communist Party sought to argue that all subsequent acts of the National Government undertaken without its consent were invalid or unconstitutional.

This position was specifically reaffirmed in the Central Committee's declaration of November 21, 1948, and amplified by later statements. Mao Tse-tung openly demanded the "abrogation of treaties of national betrayal" in submitting "peace terms" to the Kuomintang on January 14, 1949.⁷³ A further clarification of the Communist position was included in the "draft terms of domestic peace" transmitted by the Chinese Communist Party to Nationalist emissaries on April 15, 1949, Article 7 of which proposed:

Both parties agree that all diplomatic treaties and agreements concluded during the rule of the Nanking National Government, and other public and secret diplomatic documents and files should be handed over by the Nanking National Government to the Democratic Coalition Government and be examined by the Democratic Coalition Government. Among them, all which are detrimental to the Chinese people and country, especially those having the nature of selling out national rights, should be abrogated, revised or re-concluded according to their different cases.⁷⁴

But it was reserved to the "common program" of the Chinese People's Political Consultative Conference, adopted September 29, 1949, to assert the most extreme attitude on this question. In effect, the new government thereby asserted that it did not consider itself bound in principle by any treaty antedating its advent to power unless its specific assent were obtained:

The Central People's Government of the People's Republic of China shall examine the treaties and agreements concluded between the Kuomintang and foreign governments, and recognize, or abrogate, or revise or renew them according to their respective contents.⁷⁵

An enumeration in general terms of the treaties and agreements considered to "disgrace the country and strip it of its rights" was included in the Central Committee declaration of February 1, 1947:

These diplomatic negotiations include loans from foreign governments, continuation of lend-lease, buying and accepting munitions and surplus war materials, forming of treaties regarding special rights in commerce, navigation, aviation and other special economic and legal rights.

These negotiations and agreements request or permit foreign land, sea and naval forces to be stationed in or operate on the waterways, territories, and in the air of the country, and to enter or occupy and jointly construct and make use of military bases and points strategic to their national defense. They, furthermore, request or permit foreign military and other personnel to participate in the organization, training, transportation and military operations of land, air and

⁷³ North Shensi Radio, Jan. 14, 1949.

⁷⁴ Full text in *China Digest*, Vol. 6, No. 3 (May 3, 1949), p. 22.

⁷⁵ Art. 55, *loc. cit.*, note 4, *ante*.

naval forces of this country, and to become conversant with military and other state secrets of the country. They also permit such serious matters as foreign intervention in internal affairs.

This general list will be recognized as one referring primarily to various agreements entered into between the United States and China which provided some measure of direct or indirect assistance to the Kuomintang. Some agreements—such as the unpublished agreement under which the Joint United States Military Advisory Group assisted in the reorganization of the Chinese high command—may be considered as having been executed, creating no rights that would survive the ultimate demise of the Kuomintang régime. Many others, however, such as the Sino-American Treaty of Friendship, Commerce and Navigation of November 4, 1946,⁷⁶ were designed to determine private rights over an extended period of time, and the demand for the abrogation of such treaties immediately raises a question of the nature of the rights to be enjoyed by American nationals in Communist China. In addition to the commercial treaty, various other Sino-American agreements of recent years would doubtless fall under the Communist interdict: the agreement on the disposition of lend-lease supplies,⁷⁷ the surplus property agreement,⁷⁸ the mutual aid agreement,⁷⁹ the agreement on United States armed forces in China,⁸⁰ the agreement on relief assistance,⁸¹ the agreement on the United States Educational Foundation in China,⁸² the agreement for the transfer of United States naval vessels and equipment,⁸³ the agreement on economic aid,⁸⁴ and the agreement on the Joint Commission on Rural Reconstruction.⁸⁵ A further enumeration of objectionable agreements is found in the statement understood to have been submitted to the United Nations on October 21, 1948, by nine “democratic parties and groups” friendly to the Chinese Communists, whose view on this question is substantially identical.⁸⁶

The Sino-American Treaty of Friendship, Commerce and Navigation of November 4, 1946, has been singled out by the Chinese Communists for special attack despite its complete acceptance of the principle of equal rights as between Americans and Chinese resident in non-national terri-

⁷⁶ Ratifications exchanged in Nanking, Nov. 30, 1948; proclaimed by the President Jan. 12, 1949. Department of State, *Treaties and Other International Acts Series* (hereafter cited as T.I.A.S.) 1871; this JOURNAL, Supp., Vol. 43 (1949), p. 27.

⁷⁷ Washington, June 14, 1946. T.I.A.S. 1533.

⁷⁸ Shanghai, Aug. 30, 1946. Department of State Bulletin, Sept. 22, 1946, p. 548.

⁷⁹ Washington, June 28, 1946. T.I.A.S. 1746.

⁸⁰ Nanking, Aug. 29 and Sept. 3, 1947. T.I.A.S. 1715.

⁸¹ Nanking, Oct. 27, 1947. T.I.A.S. 1674.

⁸² Nanking, Nov. 10, 1947. T.I.A.S. 1687.

⁸³ Nanking, Dec. 8, 1947. T.I.A.S. 1691.

⁸⁴ Nanking, July 3, 1948. T.I.A.S. 1837.

⁸⁵ Nanking, Aug. 3 and 5, 1948. T.I.A.S. 1848.

⁸⁶ *China Digest*, Vol. 5, No. 1 (Nov. 2, 1948), pp. 11, 16.

tory.⁸⁷ The treaty was concluded at the height of a bitter anti-American campaign in Communist China, and politically has become a symbol of protest against the "imperialist" policy of the Kuomintang. Under the guise of equality, it is alleged that "imperialist" concessions were wrung from the Chinese nation by the force of American arms, and that in a purely quantitative sense American nationals stand to gain more than Chinese.⁸⁸ In addition, since there are relatively few Chinese of the Communist persuasion engaged in business in the United States, the treaty would appear to afford secure refuge for the persons and investments of the despised "bureaucratic capitalists" in the United States. More fundamentally, however, the principle of respect for private rights which finds expression in the treaty is incompatible with the totalitarian (or quasi-totalitarian) conceptions of the Chinese Communists. Thus, should the United States recognize the Chinese Communist régime in the face of Communist repudiation of the treaty, it would find American commercial, cultural, missionary and other institutions deprived of treaty protection for private rights.

3. *The Status of Foreign Nationals and Foreign Interests*

To all appearances, Chinese Communist declarations on the treatment of foreign nationals and interests have been moderate. According to the "common program" of September 29, 1949, "the Central People's Government of the People's Republic of China shall protect *law-abiding* foreign nationals in China."⁸⁹ But here, as with the earlier pledge of the Central Committee "to protect the *rightful* interests of all nationals of foreign countries in China,"⁹⁰ an important question is raised with respect to the standards of law to be applied to foreigners. For practical purposes, they are denied the legal rights defined by existing treaties wherever these treaties can unilaterally be condemned as "unequal" or "imperialist," and are exposed to the vagaries of Chinese Communist law and the revolutionary "people's courts." The proclamation of Generals Lin Piao and Lo Jung-huan to the foreign nationals of the Peking-Tientsin area on December 22, 1948, apparently reiterates the principle of protection, but with such limitations as to transform it into a warning:

⁸⁷ *Emancipation Daily* (Yenan), Nov. 26, 1947, called it "the most shameful treaty of betrayal in Chinese history." In protest, it proposed (Dec. 8, 1946) to set the anniversary of the treaty aside as "National Disgrace Day." In a speech in Yenan, Dec. 12, 1946, General Chou En-lai (now Foreign Minister) termed it a "treaty of national subjugation."

⁸⁸ See the statement of Maud Russell, Executive Director of the "Committee for a Democratic Far Eastern Policy," in Hearings before a Subcommittee of the Committee on Foreign Relations, U. S. Senate, 80th Cong., 2nd Sess., on *A Treaty of Friendship, Commerce and Navigation . . . April 26, 1948* (Washington, 1948), pp. 52-66. Owen Lattimore joined in denouncing the "spurious 'equality'" of the treaty in *The Situation in Asia* (Boston, 1949), p. 235.

⁸⁹ Art. 59. Italics added.

⁹⁰ Cited in note 65, *ante*.

The security of the lives and property of all foreign nationals will be protected. All foreign nationals must observe the laws and regulations of this Army and the Democratic Government. They must not engage in espionage activities. They must not engage in activities against the Chinese revolutionary cause. They must not harbor war criminals, counter-revolutionary elements or other criminals. Otherwise, they will be dealt with according to the laws and regulations of this Army and the Democratic Government.⁹¹

With an additional expression of the hope "that all foreign nationals will do their work as usual and preserve order," the principles of this proclamation were extended to all of Communist China by the joint proclamation issued on April 25, 1949, by Mao Tse-tung and General Chu Teh.⁹²

Communist policy toward foreign residents in China has not yet fully crystallized, and the existing "bamboo curtain" prejudices a thorough study of the subject. Nevertheless, several elements point to the direction of probable future development:

(1) Communist China considers the restoration and development of production as "the ultimate goal" of its revolutionary work.⁹³ On the whole, the economic planners contemplate a high measure of self-sufficiency for the economy of the new China. It follows that commercial relationships with the outside world will be restricted in the interests of a politically inspired economic program. An informed observer expresses this likelihood very clearly:

There will be certain limitations to future trade relations between China and foreign countries. . . . China under Communist rule is sure to follow a planned economy. China's foreign trade will be placed under strict governmental supervision and control in order to meet the requirements of the national reconstruction program, to balance her international payments and to boost native industry. . . . China's foreign trade in the future will be made to serve the interests of the national reconstruction instead of letting private traders do what they like on a purely money-making basis. The sooner the foreign businessmen understand this, the better they will be in adapting themselves to the changed situation.⁹⁴

(2) Foreigners in Communist China have already experienced increasing difficulty in the conduct of their private affairs. This may be part of a calculated intent to read them the "riot act" so that they may be disabused of notions of continuing to enjoy various *de facto* privileges

⁹¹ North Shensi Radio, Dec. 24, 1948.

⁹² Art. 8. The full text of the proclamation is in China Digest, Vol. 6, No. 2 (May 3, 1949), p. 18.

⁹³ Mao Tse-tung, address to the Shansi-Suiyuan *cadres*, April 1, 1948. North Shensi Radio, May 8-10, 1948.

⁹⁴ C. J. Canning, "The Question of Recognition," China Weekly Review (Shanghai), Vol. 114, No. 2 (June 11, 1949), pp. 32-36.

which have developed with the years.⁹⁵ A double-edged warning of the New China News Agency made clear that "under the conditions of obtaining the permission of the People's Government of China and obeying the laws of the People's Government, foreigners may engage in all honest vocations in China, but they are not permitted to maintain their imperialist prerogatives."⁹⁶ The requirement that "permission" be obtained before foreigners engage in "honest" vocations would appear to contemplate a new type of governmental veto.

(3) Authorities in various Communist-controlled areas have issued numerous highly detailed regulations governing foreign trade and commerce, international exchange, navigation and related matters.⁹⁷ While many of these are compatible with existing treaties, they lend themselves to abuses and may become extremely oppressive in application.

(4) Measures to protect the Chinese people against the "mental poisoning" of cultural imperialism⁹⁸ have been tentatively instituted. The Catholic Fu Jen University in Peking was taken under Communist control in February, 1949, and an attempt was made to abolish the use of the English language in St. John's University (Shanghai).⁹⁹ Sweeping curricular modifications in Communist-controlled universities and colleges in China, designed to increase the "anti-imperialist" political consciousness of students, are necessarily incompatible with the educational objectives of foreign missionary institutions.

(5) A recent statement by the People's Court in Shanghai further implies that the judicial safeguards previously available for the protection of foreign rights are being substantially modified. In reply to a question concerning the right of foreign litigants to engage attorneys, the Court was reported to have stated that since "the old system of attorneys and counsellors is no longer applicable at present, litigants of foreign nationality naturally are not allowed to engage lawyers to plead for them before the Court."¹⁰⁰

⁹⁵ For example, the Military Control Commission in Peip'ing in February, 1949, required foreigners to "register" their automobiles but neglected to provide registration facilities. By forcing the American Consulate General in Shanghai to negotiate for the settlement of curiously oppressive wage demands of former employees of the American Navy in July-August, 1949, it was driven home to all Western employers of Chinese labor that a new order had dawned.

⁹⁶ China Digest, Vol. 6, No. 2 (May 3, 1949), p. 6. This comment, precipitated by the case of the British sloop *Amethyst*, is headlined: "This is 1949, Not 1926," and reminds the British and Americans that "the Yangtze River now belongs to the Chinese people . . . and no longer to servile and weak-minded traitors."

⁹⁷ Most of these regulations were reprinted or abstracted in various issues of the China Digest, China Economist (Shanghai), and Far Eastern Economic Review (Hongkong) between January and June, 1949.

⁹⁸ Mao, The Chinese Revolution and the Chinese Communist Party.

⁹⁹ China Weekly Review, Vol. 114, No. 2 (June 11, 1949), pp. 29-30.

¹⁰⁰ Correspondence on this question was published in *Ta Kung Pao* (Shanghai), Oct. 16, 1949.

At this early stage of its practice and development, an analysis of the foreign policy of the People's Republic of China must be tentative and suggestive rather than definitive. Yet it is clear that the aims and objectives of the Chinese Communist Party—and, therefore, those of the Central People's Government—are consciously and specifically drawn from the doctrines of Marxism-Leninism. The major theses of Chinese Communist foreign policy rationalize the aspirations of intransigent revolutionaries, certain of purpose, confident of destiny, and bitterly impatient with the obstacles that appear. In a "people's democratic dictatorship," which is neither "popular" nor "democratic" in any Western sense, those who dictate succeed to a degree without precedent in uniting theory with practice, foreign policy with domestic policy, analysis with propaganda. Communist China typifies a new *kind* of state, organized and motivated by a revolutionary ethic thoroughly incompatible with the existing structure of international law and relations. It struggles to attain unbridled freedom of action for the implementation of doctrines which can no longer be exposed to objective scrutiny and evaluation. If it accepts restraint, it does so from political or tactical considerations alone and not from any sense of legal obligation under international law. International law does not even receive its lip-service.

NOTES ON LEGAL QUESTIONS CONCERNING THE UNITED NATIONS

BY YUEN-LI LIANG *

OBSERVANCE IN BULGARIA, HUNGARY AND RUMANIA OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: REQUEST FOR AN ADVISORY OPINION ON CERTAIN QUESTIONS

The General Assembly of the United Nations, at its 235th plenary meeting held on October 22, 1949, adopted a resolution¹ in which it decided, *inter alia*, to ask the International Court of Justice for an advisory opinion on certain questions arising out of the controversy over the execution and interpretation of the Peace Treaties concluded between the Allied and Associated Powers of the one part, and Bulgaria, Hungary and Rumania, respectively, of the other part. The adoption of this resolution was an incidental, though important, phase of the consideration by the General Assembly of the question of "Observance in Bulgaria, Hungary and Rumania of human rights and fundamental freedoms." The purpose of this note is not to discuss the substance of the question, but to give a brief account of the deliberations in the General Assembly, both at the second part of its third session and at its fourth session, which led to the request for an advisory opinion, with emphasis on some of the legal issues involved.

I. *Consideration of the Question at the Second Part of the Third Session of the General Assembly*

A. Summary of Proceedings

Upon the initiative of Bolivia and Australia,² and on the recommendation of the General Committee,³ the General Assembly, at the second part of its third session, decided,⁴ at its 190th plenary meeting on April 13, 1949, by 30 votes to 7, with 20 abstentions, to include in its agenda an item

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¹ U.N. Doc. A/1043.

² The proposals for new items of agenda by Bolivia and Australia were contained in U.N. Docs. A/820 and A/821, respectively.

³ In the General Committee, discussions on whether to include the items in the agenda took place at its 58th and 59th meetings, held on April 6 and 7, 1949. For proceedings, see General Assembly, 3rd Sess., Pt. II, Official Records, Summary Records of General Committee, pp. 7-39.

⁴ U.N. Docs. A/SR.189, 190.

entitled "Having regard to the provisions of the Charter and of the Peace Treaties, the question of the observance in Bulgaria and Hungary of human rights and fundamental freedoms, including questions of religious and civil liberties, with special reference to recent trials of church leaders."

The Ad Hoc Political Committee considered the question at its 34th to 41st meetings, inclusive; held between April 19 and 22, 1949.⁵ Before the discussion on the substance of the question began, the Committee decided to invite the governments of Bulgaria and Hungary to send a representative each to participate, without vote, in the discussion of the question.⁶ The governments of Bulgaria⁷ and Hungary⁸ replied that they could not accept the invitation extended to them, on the ground that the United Nations had no competence in the matter.

In the course of the general discussion in the Ad Hoc Political Committee, the representative of Bolivia submitted a draft resolution⁹ in which the General Assembly would express its "deep concern at the grave accusations made against the Governments of Bulgaria and Hungary regarding the suppression of human rights and fundamental freedoms in those countries"; would "note with satisfaction that steps have been taken by several States signatories to the Peace Treaties with Bulgaria and Hungary regarding these accusations and express the hope that measures will be diligently applied in accordance with the treaties, in order to obtain a settlement which would ensure respect for human rights and fundamental freedoms"; would "most urgently draw the attention of the Governments of Bulgaria and Hungary to their obligations under the Peace Treaties, including the obligation to co-operate in the settlement of all these questions"; and would "retain the question on the agenda for the fourth session of the General Assembly."

Another draft resolution was submitted by the representative of Cuba¹⁰ providing for the appointment of a special committee "in order to elucidate the acts alleged to have been committed in Bulgaria and Hungary against human rights and fundamental freedoms, particularly the cases of the Catholic Cardinal Mindszenty and the Lutheran Bishop Ordass in Hungary and the Protestant Pastors in Bulgaria." It further proposed to bar the admission of Bulgaria and Hungary to the United Nations. This draft resolution was subsequently withdrawn.¹¹

A third draft resolution was presented by Australia.¹² According to this, the General Assembly would express the view that "a *prima facie* case of abridgement of human rights and fundamental freedoms in Bul-

⁵ U.N. Doc. A/AC.24/SR.34-41.

⁶ This was done on a draft resolution of Australia, U.N. Doc. A/AC.24/50.

⁷ U.N. Doc. A/AC.24/58.

⁸ U.N. Doc. A/AC.24/57.

⁹ U.N. Doc. A/AC.24/51/Corr.1.

¹⁰ U.N. Doc. A/AC.24/48/Rev.2.

¹¹ U.N. Doc. A/AC.24/SR.41, p. 9, statement of the Chairman.

¹² U.N. Doc. A/AC.24/52.

garia and Hungary" had been established but that further investigation was needed before a final conclusion could be reached. It further provided for the establishment of a committee to inquire into the situation in these countries, in respect of human rights and fundamental freedoms, and to report to the fourth session of the General Assembly. As this draft resolution was subsequently superseded by the joint amendment of Cuba and Australia, it was declared withdrawn.¹³

To the Bolivian draft resolution, which appeared likely to have the support of a majority of the members of the Committee, three amendments were introduced. One of these was introduced by Chile¹⁴ which would insert a paragraph stating that "respect for obligations under international treaties is one of the fundamental principles of the Organization and essential for peace and security in the relations between States." It also proposed to add another new paragraph in which the General Assembly would "condemn" the acts committed by Bulgaria and Hungary in violation of human rights and fundamental freedoms. This latter paragraph was, however, subsequently withdrawn.¹⁵

Another amendment was introduced jointly by Colombia and Costa Rica.¹⁶ This would add a new subparagraph providing that the General Assembly "decides to withdraw, in relation to Bulgaria and Hungary, Resolution 197(III)," which resolution asked the Security Council to reconsider the applications of those states for membership in the United Nations. As it was pointed out by the representatives of the Ukraine and France that the Committee could not re-open discussion on a decision of the General Assembly, its sponsors withdrew the amendment.¹⁷

A third amendment was proposed jointly by Cuba and Australia.¹⁸ The purport of this amendment was to replace the last paragraph of the Bolivian proposal, which provided for the retention of the question on the agenda of the fourth session of the General Assembly, by two new paragraphs providing mainly for the establishment of a committee "to study the situation in Bulgaria and Hungary, in respect of human rights and fundamental freedoms," and to report to the fourth session of the General Assembly.

The Ad Hoc Political Committee, at its 41st meeting, held on April 22, voted on the Bolivian draft resolution and the remaining amendments thereto. It decided to reject both the Chilean and the joint Cuban-Australian amendments.¹⁹ By a vote of 34 to 6, with 11 abstentions, it decided to adopt the Bolivian draft resolution as a whole.²⁰ The report

¹³ U.N. Doc. A/AC.24/SR.41, p. 9, statement of the Chairman.

¹⁴ U.N. Doc. A/AC.24/53.

¹⁵ U.N. Doc. A/AC.24/SR.41, p. 12.

¹⁶ U.N. Doc. A/AC.24/54.

¹⁷ U.N. Doc. A/AC.24/SR.41, pp. 10-12.

¹⁸ U.N. Doc. A/AC.24/56.

¹⁹ U.N. Doc. A/AC.24/SR.41, pp. 14, 15.

²⁰ For detailed results of the votes, see *ibid.*, pp. 16-20.

of the Ad Hoc Political Committee,²¹ embodying the above-mentioned draft resolution, was considered by the General Assembly at its 201st to 203rd plenary meetings, held on April 29 and 30, and the draft resolution was adopted by 34 votes to 6, with 9 abstentions.

The text of the resolution as adopted is as follows:

The General Assembly,

Considering that one of the purposes of the United Nations as to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Governments of Bulgaria and Hungary have been accused, before the General Assembly, of acts contrary to the purposes of the United Nations and to their obligations under the Peace Treaties to ensure to all persons within their respective jurisdictions the enjoyment of human rights and fundamental freedoms,

1. *Expresses* its deep concern at the grave accusations made against the Governments of Bulgaria and Hungary regarding the suppression of human rights and fundamental freedoms in those countries;
2. *Notes* with satisfaction that steps have been taken by several States signatories to the Peace Treaties with Bulgaria and Hungary regarding these accusations, and expresses the hope that measures will be diligently applied in accordance with the Treaties, in order to ensure respect for human rights and fundamental freedoms;
3. *Most urgently draws* the attention of the Governments of Bulgaria and Hungary to their obligations under the Peace Treaties, including the obligation to co-operate in the settlement of all these questions; and
4. *Decides* to retain the question on the agenda of the fourth regular session of the General Assembly of the United Nations.

The foregoing is a brief summary of the proceedings of the second part of the third session of the General Assembly on the question under review. This question centered around the observance or non-observance of human rights and fundamental freedoms in Bulgaria and Hungary. In the course of the discussions, charges of violations of the Charter and the Peace Treaties were brought by some delegations against these two countries which were categorically denied by some other delegations. Several legal questions were involved which it may be of interest to review. It may be said that much of the discussion was repetitious in the General Committee, the Ad Hoc Political Committee and the plenary meetings. Only the salient arguments, pro and con, are herein outlined.

²¹ U.N. Doc. A/844.

B. Alleged Violations by Bulgaria and Hungary of the Charter
and of the Peace Treaties

1. *Alleged Violations by Bulgaria and Hungary*

In the course of the discussions on the question, it was alleged by the representatives of Australia, Bolivia, the United States, and the United Kingdom, among others, that Bulgaria and Hungary had committed certain acts in violation of human rights and fundamental freedoms, including the maladministration of justice, the denial of the freedoms of political opinion, of expression, of press and publication, of public meeting and of religious worship. The trial of Cardinal Mindszenty in Hungary and that of the fifteen Protestant pastors in Bulgaria, and the suppression of political parties and of churches were, among others, cited in support of the allegations.²²

These allegations were categorically refuted by Bulgaria and Hungary in telegrams to the Secretary General, and by Byelorussia, Czechoslovakia, Poland, the Soviet Union and Yugoslavia in the General Assembly. It was argued that all civil, political and religious freedoms existed in Bulgaria and Hungary and that Cardinal Mindszenty and the fifteen Protestant pastors were tried, not for their religious activities, but for crimes punishable by penal law, namely, treason, espionage and illicit traffic in currencies. It was further argued that the acts of which Bulgaria and Hungary were accused were done in compliance with Article 4 of the Peace Treaties with those two countries which imposed upon them the obligation not to permit "the existence and activities of organizations" "of a Fascist type" "which have as their aim denial to the people of their democratic rights."²³

Whether the allegations against Bulgaria and Hungary were well founded in fact, the General Assembly, in adopting its resolution, had expressed no opinion. This point was emphasized by the representative of Australia, Mr. N. J. O. Makin, who, in the course of his statement before the General Assembly in support of the draft resolution recommended by the Ad Hoc Political Committee, declared:

The resolution is a re-affirmation of the pledge of all Members to take joint and separate action to promote respect for human rights. It did not pass judgment on Bulgaria and Hungary. The Australian delegation had stressed from the outset that there could not be any

²² For details, see especially the remarks of the Australian representative, Mr. Makin, U.N. Doc. A/AC.24/SR.36, pp. 10-18; the U. S. representative, Mr. Cohen, *ibid.*, pp. 19-27; and the Bolivian representative, A/AC.24/SR.34, pp. 10-19.

²³ For details, see especially telegrams from the Bulgarian Government, U.N. Docs. A/832, A/AC.24/58; and from the Hungarian Government, U.N. Docs A/831, A/AC.24/57; also remarks of the Soviet representative, Mr. Malik, A/AC.24/SR.39, pp. 7-14.

such judgment without a full investigation of the facts by the General Assembly.²⁴

2. *The Human Rights Provisions of the Charter and of the Peace Treaties*

According to the delegations which brought charges against Bulgaria and Hungary, the acts alleged to have been committed by the latter governments constituted violations of the provisions of the Charter of the United Nations. They pointed out that under Article 1, paragraph 3, of the Charter, one of the purposes of the United Nations was

to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. . . .

Article 13, paragraph 1, stipulated:

The General Assembly shall initiate studies and make recommendations for the purpose of: . . . (b) promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

They further pointed out that Article 55 of the Charter provided:

. . . the United Nations shall promote . . . (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Bulgaria and Hungary were also charged with having violated the Treaties of Peace under which, it was maintained, they had undertaken to

take all measures necessary to secure to all persons under Bulgarian [Hungarian] jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting.²⁵

In addition, under another paragraph of her Treaty, Hungary had further undertaken:

that the laws in force in Hungary shall not, either in their content or in their application, discriminate or entail any discrimination between persons of Hungarian nationality on the ground of their race, sex, language or religion, whether in reference to their persons, property, business, professional or financial interests, status, political or civil rights or any other matter.²⁶

²⁴ U.N. Doc. A/SE.202, p. 3.

²⁵ Art. 2, Peace Treaty with Bulgaria; Art. 2, par. 1, Treaty with Hungary.

²⁶ Par. 2 of Art. 2. The Treaty with Bulgaria does not contain this provision.

C. The Question of the Competence of the General Assembly

1. *Domestic Jurisdiction*

Throughout the consideration of the question under review, the delegations of Byelorussia, Czechoslovakia, Poland, the Soviet Union and Yugoslavia insisted that the question was essentially within the domestic jurisdiction of Bulgaria and Hungary and that under Article 2, paragraph 7, of the Charter, the United Nations had no authority to intervene.²⁷ On the other hand, it was pointed out by the representative of Australia, Mr. H. V. Evatt,²⁸ that it was laid down in Article 10 of the Charter that the General Assembly "may discuss any questions or any matters within the scope of the present Charter." Furthermore, under Article 55 it was incumbent upon the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." The representative of Panama, Mr. Ricardo J. Alfaro,²⁹ declared that the Charter stated in seven different places that it was the duty of the United Nations to safeguard human rights and to ensure that they were observed. It was evident, therefore, that the United Nations should be able to intervene in the case of a violation of human rights; otherwise those provisions would be worthless.

It may be of interest to note that references were made to the meaning of the word "intervention" in Article 2, paragraph 7, of the Charter. The representative of Uruguay, Mr. Alberto Dominguez Cámpora,³⁰ defined it as "unlawful intervention." If, according to him, states had mutually undertaken to apply certain standards, had agreed to set up an organ to ensure their application, and if that organ then intervened in the domestic affairs of a state, there could be no question of unlawful interference; that would be a legal act. The representative of the United States, Mr. Benjamin V. Cohen,³¹ maintained the view that "discussion could not normally be construed as 'intervention' within the meaning of Article 2, paragraph 7."

2. *The Peace Treaties in Relation to the Question*

It was urged by a number of representatives that the existence of the Peace Treaties had the effect of rendering the matter under consideration one of international concern and of placing it outside the scope of Article 2, paragraph 7, of the Charter. In support of this view, the United King-

²⁷ See, for instance, the remarks of the representative of Poland, General Assembly, 2nd Sess., Pt. II, Official Records, Summary Records of the General Committee, pp. 10, 11; and remarks of the U.S.S.R. representative, *ibid.*, p. 26.

²⁸ *Ibid.*, p. 15.

²⁹ *Ibid.*, p. 20.

³⁰ U.N. Doc. A/SR.190, p. 9.

³¹ U.N. Doc. A/SR.189, p. 12.

dom representative, Sir Alexander Cadogan,³² cited the advisory opinion given by the Permanent Court of International Justice in connection with the nationality decrees issued in Tunis and Morocco.³³ The Court had declared that the right of a state to use its discretion in a matter such as that of nationality, which was one of domestic jurisdiction, was, nevertheless, restricted by obligations which it might have undertaken towards other states. In such a case, the jurisdiction of a state was limited by the rules of international law. The representative of Chile, Mr. Hernán Santa Cruz,³⁴ referred to the question of the treatment of Indians in South Africa. He pointed out that, in that connection, the Soviet representative, Mr. Andrei Y. Vyshinsky,³⁵ had taken the position that in view of the existence of an agreement between the governments of India and the Union of South Africa, the principle of domestic jurisdiction did not apply.

The representative of the Soviet Union, Mr. Jacob A. Malik,³⁶ cited Article 107 of the Charter in support of his position that the question of the Peace Treaties and their implementation was outside the competence of the United Nations. It was further contended by the representative of Poland, Mr. Juliusz Katz-Suchy,³⁷ that even if a violation of the Peace Treaties had been committed, the procedures laid down in these treaties relating to their execution and interpretation should be applied. On the other hand, the representative of Australia, Mr. Evatt,³⁸ argued that the provisions of a treaty between states did not affect the jurisdiction of the United Nations, if such jurisdiction already existed. It was important to refer to treaties, but states could not, by agreement between themselves, rule out the jurisdiction of the United Nations as conferred by the Charter. That was, he said, the meaning of Article 103 of the Charter.

3. *The Obligations of Non-Members*

In the course of the discussions in the General Committee, another ground was advanced as precluding the competence of the United Nations in the present controversy. The representative of Poland, Mr. Katz-Suchy,³⁹ questioned whether Bulgaria and Hungary, not being Members of the United Nations, were in any way legally bound to comply with the Charter

³² General Assembly, 3rd Sess., Pt. II, Official Records, Summary Records of the General Committee, p. 19.

³³ See Publications of the Permanent Court of International Justice (Leyden, 1923), Series B, Advisory Opinions, 1-10, No. 4.

³⁴ General Assembly, 3rd Sess., Pt. II, Official Records, Summary Records of the General Committee, p. 17.

³⁵ See General Assembly, 1st Sess., Pt. I, Official Records, 52nd plenary meeting.

³⁶ General Assembly, 3rd Sess., Pt. II, Official Records, Summary Records of the General Committee, p. 28.

³⁷ *Ibid.*, p. 12. The Soviet, Czechoslovak and Ukrainian representatives took the same position.

³⁸ *Ibid.*, p. 16.

³⁹ *Ibid.*, p. 10.

provisions concerning human rights and fundamental freedoms. The only provision of the Charter, he maintained, which could be interpreted as imposing an obligation on a state not a Member of the United Nations concerned only the maintenance of international peace and security. This provision was Article 2, paragraph 6, which provided that the United Nations shall "ensure that States which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security." It was claimed that, as the case in question did not involve the maintenance of international peace and security, the provision did not apply.⁴⁰ The representative of the United States, Mr. Warren R. Austin,⁴¹ on the other hand, took the view that respect for international obligations assumed under the Peace Treaties by Bulgaria and Hungary was essential if the general welfare of the peoples of the world and friendly relations among nations were to be ensured. "Peace itself depended upon the observance of the provisions of the Peace Treaties," he declared.

II. *Measures Taken by the Several States in Application of the Procedures Provided in the Peace Treaties for the Settlement of Disputes*

The Peace Treaties with Bulgaria, Hungary and Rumania contain identical provisions laying down elaborate procedures for settling disputes over the interpretation and execution of the treaties. Article 36 of the Peace Treaty with Bulgaria, Article 40 of the Peace Treaty with Hungary, and Article 38 of the Peace Treaty with Rumania, all stipulate that, except where another procedure is specifically provided under any article of the treaty, any dispute concerning the interpretation or execution of the treaty which is not settled by direct diplomatic negotiations, shall be referred to the heads of the diplomatic missions in the respective capitals, of the Soviet Union, the United Kingdom and the United States. They also provide that any such dispute not resolved by the three Heads of Mission within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Finally, should the two parties fail to agree within a period of one month upon the appointment of a third member, the Secretary General of the United Nations may be requested by either party to make the appointment. The decision of the majority of the members of such a commission shall be the decision of the commission and shall be accepted by the parties as definitive and binding.

In pursuance of the above-mentioned provisions and in accordance with

⁴⁰ See, for instance, remarks of the Polish representative, U.N. Doc. A/SR.159, p. 15.

⁴¹ *Ibid.*, p. 34.

the resolution of the General Assembly of April 30, 1949, referred to above, the governments of the United Kingdom and the United States took certain steps ⁴² looking towards the implementation of the provisions of the Peace Treaties. In line with the procedures set forth in the Peace Treaties, these measures fell into three stages.

A. First Stage: Direct Diplomatic Negotiations

On April 2, 1949, the governments of the United Kingdom and the United States addressed parallel notes to Bulgaria, Hungary and Rumania, charging them with instances of violations of the respective clauses of the Peace Treaties which obligated them to secure to their peoples the enjoyment of human rights and fundamental freedoms. The United Kingdom and the United States governments requested that remedial measures be taken by the three governments in respect of the alleged violations. Canada associated herself with the contents of the United States notes to Hungary and Rumania. Although she was not a signatory to the treaty with Bulgaria, she declared that her view was identical with that of the United States. Australia and New Zealand associated themselves with the notes of the United Kingdom.

In their replies to these notes, Bulgaria, Hungary and Rumania rejected all charges of violations of the Peace Treaties and accused the United Kingdom and the United States of attempting to interfere in their domestic affairs.

B. Second Stage: Requests for Reference of the Disputes to the three Heads of Mission

In notes dated May 31, 1949, addressed to Bulgaria, Hungary and Rumania, the United Kingdom and the United States expressed dissatisfaction with the replies of the three governments, and declared that, in their view, a dispute had arisen concerning the execution and interpretation of the Treaties of Peace which the three governments respectively had shown no disposition to join in settling by direct diplomatic negotiations. It was stated that in each case the Heads of Mission of the United Kingdom and the United States in the three capitals had been instructed to refer the dispute to the three Heads of Mission in accordance with the relevant provisions of the Peace Treaties. The governments of Australia and New Zealand associated themselves with the notes of the United Kingdom.

The Head of Mission of the United Kingdom in each of the three capitals accordingly approached his colleagues from the United States and the

⁴² The texts of the notes exchanged between the United Kingdom on the one hand, and Bulgaria, Hungary, Rumania and the Soviet Union on the other, may be found in U.N. Doc. A/990. Those between the United States and the latter four governments are contained in U.N. Doc. A/985.

Soviet Union with a view to considering the alleged disputes. The Heads of Mission of the United States did likewise to their colleagues from the United Kingdom and the Soviet Union.

While in each case the United Kingdom and the United States were in agreement on the reference of the disputes to the three Heads of Mission, the Soviet Government replied in the negative. In notes delivered by its Embassies in Washington and London, the Soviet Union took the view that Bulgaria, Hungary and Rumania had fulfilled all their obligations under the Peace Treaties, and that the charges of violations of the treaties and the invoking of the treaty procedures were an attempt to interfere in the internal affairs of those countries. It was stated that the Soviet Union therefore did not see any ground for convening the three Heads of Mission for the purpose of considering the questions raised by the United Kingdom and the United States.

In reply to the Soviet notes, the United Kingdom and the United States, by notes of June 30, 1949, presented counter-arguments and expressed the hope that the Soviet Government would reconsider its decision and comply with their requests for consultation. To these representations, the Soviet Government replied, in a note of July 19, 1949, to the United States, that it did not see any basis for review of its position.

C. Third Stage: Requests for Reference of Disputes to Commissions

As their requests for three-Power consultations had failed, the United Kingdom and the United States, in parallel notes of August 1, 1949, to Bulgaria, Hungary and Rumania, requested that the disputes in each case be referred to a commission, in pursuance of the provisions of the respective Peace Treaties. They were each asked to join the United Kingdom and the United States in appointing such commissions. The governments of Australia and New Zealand associated themselves with the note of the United Kingdom to Bulgaria, while the governments of Australia, Canada and New Zealand associated themselves with the notes to Hungary and Rumania.

All three governments—Bulgaria, Hungary and Rumania—rejected this request in separate notes, denying the existence of disputes within the meaning of the relevant provisions of the Peace Treaties.

On September 19, 1949, the United Kingdom and the United States addressed further notes to the governments of Bulgaria, Hungary and Rumania, in which it was stated that the refusal of the three governments to join in establishing the commissions envisaged in the treaties was a further deliberate breach of their obligations under the Peace Treaties. They further declared that they were nonetheless determined to take all possible measures which might be open to them to secure the compliance by the three governments with the provisions of the treaties.

III. *Consideration of the Question at the Fourth Session of the General Assembly*

The question of "Observance in Bulgaria and Hungary of human rights and fundamental freedoms" was placed on the provisional agenda of the fourth session of the General Assembly, in pursuance of the resolution of the General Assembly referred to above. One month before the opening of the session, the Government of Australia proposed that the General Assembly consider the same question as it related to Rumania.⁴³ On the recommendation of the General Committee,⁴⁴ the General Assembly decided, at its 224th meeting, held on September 22, 1949, to include the item "Observance in Bulgaria, Hungary and Rumania of Human Rights and Fundamental Freedoms" in its agenda and to refer it to the Ad Hoc Political Committee for consideration and report.⁴⁵

The Ad Hoc Political Committee considered the question during its 7th to 15th meetings, inclusive, held between October 4 and 13, 1949. At the beginning of its deliberations, the Committee decided to invite the Government of Rumania to send a representative to participate, without vote, in the discussions of the question. The invitation was, however, rejected by the Government of Rumania.⁴⁶

A. *Alleged Violations by Rumania of the Charter and of the Peace Treaty*

In the course of the discussions in the Ad Hoc Political Committee, various charges were brought against Rumania that she violated human rights and fundamental freedoms.⁴⁷ It was alleged that the judicial process in Rumania did not conform to common standards of justice and that the freedoms of the press, of opinion, of association and of religion did not exist. The arrest and detention without trial of six bishops of the Uniate Church and the dissolution of the Greek Orthodox Church were cited as evidence. It was contended that these constituted violations of the Charter of the United Nations and the Peace Treaty concluded between Rumania and the Allied and Associated Powers.⁴⁸

All these allegations were categorically denied by the representative of the Soviet Union,⁴⁹ among others. He stated that Rumania, like Bulgaria and Hungary, had not violated human rights or fundamental freedoms and had fulfilled all her obligations under the Peace Treaty and the Charter

⁴³ U.N. Doc. A/948.

⁴⁴ For discussions in the General Committee, see U.N. Doc. A/BUR/SR.65, pp. 7-10; and the Report of the General Committee, U.N. Doc. A/989, pp. 1, 9.

⁴⁵ U.N. Doc. A/SR.224, pp. 2-4.

⁴⁶ U.N. Doc. A/AC.31/L.4.

⁴⁷ See especially statements by the representatives of Australia, Mr. Makin, and the U.S., Mr. Cohen, U.N. Doc. A/AC.31/SR.7, pp. 3, 4 and 9.

⁴⁸ The provisions on human rights of this treaty are identical with those of the Treaty with Hungary. The latter are quoted in a preceding paragraph.

⁴⁹ U.N. Doc. A/AC.31/SR.12, p. 13.

of the United Nations. The acts of which Rumania was accused were done, he argued, in pursuance of Article 5 of the Peace Treaty, which obligated Rumania not to "permit in future the existence and activities of organizations" "of a Fascist type," "which have as their aim denial to the people of their democratic rights."⁵⁰

B. The Proposal to Request an Advisory Opinion

The discussions in the Ad Hoc Political Committee centered around a draft resolution⁵¹ jointly proposed by Bolivia, the United States and Canada. The main purport of this draft resolution was that the General Assembly should decide to submit to the International Court of Justice for an advisory opinion four questions relating to the interpretation and implementation of the provisions of the Peace Treaties concerning the settlement of disputes.

In introducing the joint draft resolution, the United States representative, Mr. Cohen,⁵² stated that, in implementation of the General Assembly resolution adopted at its previous session, the United States had taken steps to set in motion the machinery provided in the Peace Treaties for the settlement of disputes. Similar steps were taken by several other signatories to the treaties. The governments of Bulgaria, Hungary and Rumania, however, repeatedly denied any violation of the treaties, alleging that the actions against which the United States had protested were taken against subversive and Fascist elements, that they were in any case matters falling within their own jurisdiction and that any effort to make them the subject of a dispute under the treaties constituted an unwarranted intervention in their internal affairs. The refusal of the three governments to participate in the treaty procedures was a further violation of the treaties as well as of the General Assembly's resolution. By stating that they considered their obligations under the treaties fulfilled and denying the existence of any dispute requiring the application of the treaty machinery, they sought to evade all charges of violations. The United States representative maintained that the refusal by the three governments raised a legal issue of paramount importance. Accordingly, he urged the General Assembly to request an advisory opinion of the International Court of Justice on the legal questions concerning the applicability and implementation of the treaty procedures.

The proposal to request an advisory opinion of the International Court of Justice received considerable support in the Ad Hoc Political Committee, many of whose members thought the refusal to carry out the treaty procedures on the part of the three governments unjustified. Thus the delegations of Sweden, Denmark, Norway and Iceland⁵³ which, at the

⁵⁰ *Ibid.*, p. 5.

⁵¹ U.N. Doc. A/AC.31/L.1/Rev.1.

⁵² U.N. Doc. A/AC.31/SR.7, pp. 9-11.

⁵³ U.N. Docs. A/AC.31/SR.9, pp. 9, 10, 12, 13; A/AC.31/SR.10, p. 7.

previous session of the General Assembly, had not voted in favor of the consideration of the question, but urged the settlement of the dispute by the treaty procedures, expressed dissatisfaction with the attitude of the three governments and spoke in favor of the joint draft resolution.

On the other hand, the representative of the Soviet Union, Mr. Vyshinsky,⁵⁴ took the position that Bulgaria, Hungary and Rumania were not guilty of violating the Peace Treaties, that no dispute existed within the meaning of the treaties, and that there was therefore no reason to request an advisory opinion. He maintained that the Peace Treaties stipulated that in all questions relating to the interpretation and execution of the treaties, agreement had to be reached among the representatives of the United States, the Soviet Union and the United Kingdom. If there was no agreement among those three states, no action could be taken in implementation of the treaty procedures. In the present case, there was no such agreement, "inasmuch as the Soviet Union did not recognize the existence of a dispute or of violations of the Peace Treaties." "Consequently," he added, "attempts to apply Peace Treaty machinery were obviously a violation of the Charter, so that there was no reason at all to apply to the International Court of Justice for an advisory opinion."

In reply to the Soviet arguments, the representative of the United States, Mr. Cohen,⁵⁵ relied on Article 36 of the Treaty with Bulgaria, Article 40 of the Treaty with Hungary and Article 38 of the Treaty with Rumania, and pointed out that the three Powers did not have to come to a prior agreement as to the existence of a dispute before the treaty procedures could be applied. If prior agreement were necessary, he continued, there would be no point in stipulating that the question should be referred to the three Heads of Mission, since the latter would already have the matter before them. There was therefore no doubt that the treaty procedures applied to any dispute arising between any of the signatories.

C. The Questions to be Referred to the Court for an Advisory Opinion

The questions which the joint draft resolution proposed to have referred to the International Court of Justice for an advisory opinion are as follows:

"I. Do the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand and certain Allied and Associated Powers signatories to the Treaties of Peace on the other, concerning the implementation of article 2 of the Treaties with Bulgaria and Hungary and article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in article 36 of the Treaty of Peace with Bulgaria, article 40 of the Treaty of Peace with Hungary, and article 38 of the Treaty of Peace with Romania?"

In the event of an affirmative reply to question I:

"II. Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the articles referred to in question

⁵⁴ U.N. Doc. A/AC.31/SR.12, p. 6.

⁵⁵ U.N. Doc. A/AC.31/SR.14, p. 15.

I, including the provisions for the appointment of their representatives to the Treaty Commissions?"

In the event of an affirmative reply to question II and if within thirty days from the date when the Court delivers its opinion, the Governments concerned have not notified the Secretary-General that they have appointed their representatives to the Treaty Commissions, and the Secretary-General has so advised the International Court of Justice:

"III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Rumania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties?"

In the event of an affirmative reply to question III:

"IV. Would a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations constitute a Commission, within the meaning of the relevant Treaty articles, competent to make a definitive and binding decision in settlement of a dispute?"

D. Amendments to the Proposal

To the joint draft resolution the representative of Australia introduced an amendment⁵⁶ proposing that an *ad hoc* committee be appointed by the General Assembly which would be convened immediately by the Secretary General should the Court reply in the negative to question I or II, or should the three governments concerned fail, in the event of the replies to both questions being in the affirmative, to appoint their national representatives to the respective Treaty Commissions within thirty days of the date of the advisory opinion. It further proposed to instruct the *ad hoc* committee to report to the fifth session of the General Assembly upon the situation in Bulgaria, Hungary and Rumania with respect to the observance of human rights and fundamental freedoms.

Another amendment⁵⁷ was introduced by the representatives of Brazil, Lebanon and The Netherlands. This proposed to insert a reference to Article 55 of the Charter in the preamble of the joint draft resolution and to replace the first paragraph of the operative part thereof—which paragraph affirmed the continuing interest in and deep concern at the grave accusations made against Bulgaria, Hungary and Rumania—by two new paragraphs. The first of these would express the continuing interest and increased concern of the General Assembly at the grave accusations made against Bulgaria, Hungary and Rumania. The second new paragraph would record the opinion that the refusal of the three countries to coöperate

⁵⁶ U.N. Doc. A/AC.31/L.2.

⁵⁷ U.N. Doc. A/AC.31/L.3.

in the efforts of the General Assembly to examine the grave accusations justified this concern.

E. Discussions on the Questions to be Referred
to the International Court of Justice

While most delegations were in principle in favor of referring legal questions in connection with the case to the International Court of Justice for an advisory opinion, discussions on the several questions proposed for reference to the Court were relatively scanty. Several delegations,⁵⁸ including those of France, Australia, Mexico, the Dominican Republic and Peru, however, raised strong objections to questions III and IV. Question III concerns the authority of the Secretary General of the United Nations to appoint a third member of a commission. Question IV concerns the competence of a commission composed of two members to make a definitive and binding decision.

According to the French representative, Mr. Pierre Ordonneau,⁵⁹ the treaties laid down an arbitration procedure which was only possible if both parties agreed to appoint their arbitrators. It was therefore impossible to contemplate setting up a commission for arbitration on which one of the parties refused to be represented, even if it were at fault in so refusing. The French representative stated that precedents existed which bore out his point of view. After the second World War, a procedure of arbitration had been envisaged between Finland and the Soviet Union with regard to Karelia. As the Soviet Union refused to appoint an arbitrator, nothing further was done in the matter and there was no question of setting up an arbitration commission which would include representatives of one side only.

The representative of Australia, Mr. Makin,⁶⁰ expressed doubts whether a commission composed of two members only would be one within the meaning of the treaties. Such a commission would hardly be able to escape the charges of bias which would undoubtedly be leveled against them. He further pointed out that the provision of the Peace Treaties that such commissions should decide matters by a simple majority would probably make it difficult for a two-member commission to reach decisive conclusions in most matters. Moreover, those governments which had declined to co-operate in the settlement of disputes under a certain procedure were not likely to follow the conclusions reached by the application of that procedure.

On the other hand, the representative of India, Sir Benegal N. Rau,⁶¹ stressed the importance of having the two questions settled because of the

⁵⁸ The remarks of the representative of Mexico may be found in U.N. Doc. A/SR.235, p. 13; of the representative of the Dominican Republic, in A/SR.234, pp. 24, 25; the representative of Peru declared himself in favor only of question I, U.N. Doc A/SR.235, pp. 13, 14.

⁵⁹ U.N. Doc. A/AC.31/SR.14, p. 17; see also A/SR.234, p. 9.

⁶⁰ U.N. Doc. A/AC.31/SR.10, p. 8.

⁶¹ *Ibid.*, p. 4.

bearing they might have on the drafting of future treaties. He referred to a case before the Privy Council of the United Kingdom in which it was held that, since the Government of Northern Ireland refused to appoint a representative on a boundary commission which, according to a treaty, was to consist of three persons, one to be appointed by the Government of the Irish Free State, one by the Government of Northern Ireland and one by the United Kingdom Government, "there was no constitutional means under the existing statute for bringing the boundary commission into existence."

The representative of the United Kingdom, Sir Hartley Shawcross, while defending the propriety of referring the questions to the International Court of Justice, expressed the opinion that "convincing arguments could have been advanced on both sides" on the substance of the questions. "The resolution merely sought the guidance of the Court on the precise meaning" of the relevant provisions of the Peace Treaties.⁶²

F. Adoption of the Resolution

The joint draft resolution and amendments thereto were put to the vote at the 15th meeting of the Ad Hoc Political Committee on October 13. The Brazil-Lebanon-Netherlands amendment was adopted. The Australian amendment was rejected. The joint draft resolution as a whole, as amended, was adopted by 41 votes to 5, with 9 abstentions.⁶³

The draft resolution of the Ad Hoc Political Committee was considered by the General Assembly at its 234th and 235th meetings, held on October 22 and 23, 1949.⁶⁴ It was adopted as a whole by 47 votes to 5, with 7 abstentions.⁶⁵

⁶² Final debate on the question in the plenary meeting, U.N. Doc. A/SR.234, p. 36.

⁶³ U.N. Doc. A/AC.31/SR.15, pp. 3-6. As to the four questions to be referred to the International Court of Justice, the votes for their adoption were as follows: question I, 45 votes to 5, with 4 abstentions; question II, 44 votes to 5, with 6 abstentions; question III, 39 votes to 6, with 8 abstentions; question IV, 39 votes to 6, with 9 abstentions.

⁶⁴ U.N. Doc. A/SR.234, 235. For text of resolution, see U.N. Doc. A/1043. The operative part of the resolution, besides submitting four questions to the International Court of Justice and retaining the question on the agenda of the fifth session of the General Assembly, reads:

"The General Assembly

"1. Expresses its continuing interest in and its increased concern at the grave accusations made against Bulgaria, Hungary and Romania,

"2. Records its opinion that the refusal of the Governments of Bulgaria, Hungary and Romania to co-operate in its efforts to examine the grave charges with regard to the observance of human rights and fundamental freedoms justifies this concern of the General Assembly about the state of affairs prevailing in Bulgaria, Hungary and Romania in this respect."

⁶⁵ The votes for the adoption of the four questions to be referred to the International Court of Justice were as follows: question I, 47 votes to 6, with 5 abstentions; question II, 46 votes to 5, with 7 abstentions; question III, 38 votes to 6 with 14 abstentions; question IV, 37 votes to 6, with 15 abstentions.

It may be noted that, in adopting the resolution, the General Assembly did not pass any judgment upon the substance or merit of the charges brought against Bulgaria, Hungary or Rumania. This seems clear from the text of the resolution in which the General Assembly merely expressed its continuing interest in, and its increased concern at, the grave accusations made against the three states. As Sir Hartley Shawcross, the United Kingdom representative, put it, "the General Assembly was not called upon to express any final conclusion at the present juncture as to whether treaty obligations had or had not been violated."⁶⁶

THE PRACTICE OF THE UNITED NATIONS WITH RESPECT
TO RESERVATIONS TO MULTIPARTITE INSTRUMENTS

It is intended to survey here the practice of the United Nations with respect to reservations which have been made by states to multipartite instruments, and to give an account of the various specific cases which have arisen. However, first, for comparative purposes, it is pertinent to refer to the procedural developments concerning reservations, which took place during the period of the League of Nations.

During this period there were indications of the growth of a practice either to define in a treaty the precise reservations the parties were disposed to admit, or to exclude expressly the making of any reservations whatsoever to the agreed text. Stipulations to this effect were not uncommon. However, they do not bind a state which intends to make a reservation, as long as it has not yet become a party to the treaty in which such stipulations are inserted. Thus, the inclusion of such stipulations constitutes, not a limitation imposed on the right to make reservations, but rather an advance indication that the consent of the other parties which is requisite for their validity, will not be forthcoming. In the case of International Labor Conventions it has been the view of the International Labor Office that the possibility of reservations is excluded, not by the terms of the conventions, but because of their "peculiar legal character," and particularly in that if a reservation were merely interpretative, the International Labor Conference in accepting it would be usurping the function of interpretation conferred by each labor convention on the International Court of Justice.¹ It is a familiar but not easy task to distinguish from reservations, properly so-called, interpretations of the text of a treaty when these are not agreed to by all the parties thereto and thus do not form an integral part of the text.²

Apparently the first example of a provision governing the making of

⁶⁶ Final debate in plenary meeting on draft resolution, U.N. Doc. A/SR.234, p. 37.

¹ This view was expressed in a memorandum submitted by the Director of the International Labor Office to the League of Nations Secretariat in connection with the examination by the Committee of Experts for the Progressive Development of International Law of the question of the admissibility of reservations to general (i.e., multipartite) conventions. See League of Nations Doc. C.212.1927.V.

² Cf. Art. 105 of the Havana Charter for an International Trade Organization.

reservations in a multipartite instrument concluded under the auspices of the League of Nations, was the Protocol to the Convention for the Simplification of Customs Formalities, 1923.³ At the end of the conference which drew up the convention, all the reservations which the conference was prepared to allow were embodied in this Protocol. They mostly related to two particular articles of the convention. The Protocol provided that subsequent reservations to those two articles should be accepted if the Council of the League so decided after consulting the Economic Committee, which was the technical body responsible for the preparatory work of the conference.⁴ This was an interesting but exceptional procedure whereby the Contracting Parties agreed in advance to be bound by the decision of the Council of the League to accept or reject any reservations made. No such obligations have been assumed in advance under United Nations practice, but the requisite consent has been given in various instances collectively by the Contracting Parties.⁵

A further example of the tendency which revealed itself during the time of the League of Nations to regulate the making of reservations by express provision, is to be found in Annex II to the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, 1930, in which were cited various possible reservations.⁶ Article 1 of the Convention also provided:

This undertaking shall, if necessary, be subject to such reservations as each High Contracting Party shall notify at the time of its ratification or accession. These reservations shall be chosen from among those mentioned in Annex II of the present Convention.

This provision was interpreted by the Drafting Committee to mean that "the acceptance of the uniform law may not be made subject to any reservations other than those indicated in Annex II of the Convention."⁷

Under the United Nations very few multipartite instruments have contained provisions governing the making of reservations. The European Broadcasting Convention, Copenhagen, 1948, and the International High Frequency Broadcasting Agreement, Mexico City, 1949, both include articles expressly excluding all reservations. The Revised General Act for the Pacific Settlement of International Disputes as adopted by the General Assembly provides, as in the original, for the making of specific reservations. The other conventions adopted by the General Assembly have not

³ Hudson, *International Legislation*, Vol. II (1922-1924), p. 1120.

⁴ This practice was viewed with approval by the Council of the League and recommended for use in connection with other technical subjects. See the Resolution of June 17, 1927. *League of Nations Official Journal*, 1927, p. 800.

⁵ See pp. 122, 125, 127, *post*.

⁶ *League of Nations Doc. C.846(I)M.142(I).1930.II*.

⁷ See *Harvard Research in International Law, Draft Convention on Treaties*, this *JOURNAL*, Supp., Vol. 29 ((1935)), p. 845.

contained any such provisions. In the case of the Convention on the Prevention and Punishment of the Crime of Genocide, when consulted on its drafting, the Legal Department of the Secretariat advised that there should be included in the text a clause governing reservations, but no action was taken on this suggestion.

Where, as is generally the case, no procedure has been stipulated in a particular instrument with regard to the making and accepting of reservations, the Secretary General of the United Nations in his capacity as depositary, has strictly observed the principle that a reservation may be received in deposit only subject to its acceptance by the other Contracting Parties.⁸ Some conventions concluded under the auspices of the League of Nations provided for an inquiry to be addressed by the depositary to the parties concerned as to the acceptability of reservations and for the presumption of consent in the absence of objection.⁹ In each case where a reservation has been made to an instrument of which the Secretary General of the United Nations is the depositary, he has notified the Contracting Parties accordingly, and subsequently, an *ad hoc* procedure has been evolved for the securing of the requisite consent. It is now proposed to give a brief account of some of these cases.

Reservations to Conventions Adopted by the General Assembly

New Zealand, when acceding on December 10, 1947, to the Convention on the Privileges and Immunities of the United Nations, the first instrument to be adopted by the General Assembly, made the following reservation:

Exemption from rates imposed on salaries and emoluments, by any law in New Zealand, shall not extend to a person who is a British subject and who is domiciled and employed in New Zealand.

Canada, on January 22, 1948, when acceding to the convention, made a similar reservation:

Exemption from taxation imposed by any law in Canada on salaries and emoluments shall not extend to a Canadian citizen residing or ordinarily resident in Canada.

⁸ In this respect the practice of the Secretariat of the League of Nations has been followed. See, as to that, Hudson, *International Legislation*, Vol. I, p. li. See, however, William Sanders in this JOURNAL, Vol. 33 (1939), p. 488, where this practice is distinguished from that of the Pan American Union. He refers to the difference in the procedure followed in securing the acceptance of reservations by the other Contracting Parties, and to the opposing views regarding the effect of the non-acceptance of a reservation by one of the Contracting Parties.

⁹ *E.g.*, Convention Concerning Economic Statistics, 1928, Art. 17, Hudson, *op. cit.*, Vol. IV (1928-1929), p. 2575; also Convention for the Prevention and Punishment of Terrorism, 1937, Art. 23, Hudson, *op. cit.*, Vol. VII (1935-1937), p. 862.

There being no clause in the convention governing reservations, the Secretary General accepted the instruments of accession tendered and notified Member States of the reservations. There were no objections to these reservations.¹⁰

It is clear that the adoption of a convention by the General Assembly does not preclude the possibility of the formulation of reservations, nor disentitle the Secretary General as depositary from entertaining them. Member States have frequently indicated their intention to accept the provisions of a convention only subject to reservations. This occurs most often either in the Sixth Committee,¹¹ or in a subcommittee thereof, or during a plenary session of the General Assembly.¹² The question was raised in the Sixth Committee during the discussion of the draft convention on genocide as to the legal implications of reservations made by delegations in this manner.¹³ The *Rapporteur* stated that the statements made on the occasion of the vote on the draft convention would be included in the record of the meeting but that they had no legal significance. Reservations which had been made by certain delegations in the Committee could be made at the time of the signature of the convention. The Chairman then expressed the feeling of the Committee by declaring that in explaining their votes, some delegations had simply wished to reserve their governments' freedom of action regarding the ratification of the convention.

Reservations to the Constitution of the International Refugee Organization

Several reservations were made by states when accepting the Constitution of the International Refugee Organization. Thus the instrument of acceptance of the United States deposited July 3, 1947, contained a reservation that such acceptance should not constitute authorization for the entry of persons into the United States without prior approval thereof by the Congress, or have the effect of amending any laws of the United States. The IRO Constitution provides that the organization shall have the power to "Conclude agreements with countries able and willing to receive refugees and displaced persons . . ." (Article 2(2)(J)), but there is no obligation

¹⁰ Subsequently the General Assembly adopted a resolution requesting Members which had not acceded to the Convention on Privileges and Immunities of the United Nations or which had acceded to it with reservations as to its section 18(b), to take the necessary action, legislative or other, to exempt their nationals employed by the United Nations from national income taxation with respect to their salaries and emoluments paid to them by the United Nations, or in any other manner to grant relief from double taxation to such nationals. See U.N. Doc. A/810, Resolution 239 (III) C.

¹¹ See the statements of various delegations in General Assembly, 3rd Sess., Pt. I, Official Records, Sixth Committee, p. 709 *et seq.*

¹² See the statement by the U. S. delegate in General Assembly, 1st Sess., Pt. I, Official Records, p. 454.

¹³ See note 11, above.

imposed upon members to admit immigrants in the absence of special agreement.

Later, on March 3, 1948, France made a reservation with the effect of reserving her right to pay all or part of her financial contributions in francs or in kind, and further that, in view of the temporary character of the organization, such contributions should only be effected during a maximum period of thirty-six months.¹⁴ The first part of this reservation purported to be in accordance with Article 10 (2) of the Constitution which deals with the financial contributions of members, and provides that: "Contributions shall be payable, as a result of negotiations undertaken at the request of Members between the organisation and such Members, in kind or in such currency as may be provided for in a decision of the General Council." Guatemala also made a reservation expressly reserving its right under this article to pay contributions in kind.

It is pertinent to note that in the course of the negotiation of the IRO Constitution the question of the admissibility of such reservations was raised, but an amendment of the text which would have excluded any reservation as to financial obligations was rejected as being too rigid and as it appeared to exclude any possibility of the giving of the consent of the parties, or of the General Council, to any such reservation even in a special case. With regard to the second part of the reservation made by France, it may be observed that the Constitution, although in Article 4 (10) providing for withdrawal from the Organization upon the giving of one year's notice, leaves a withdrawing member bound by its provisions during the period of notice.

The Secretary General then transmitted, on April 20, 1948, to all the signatory states copies of all the instruments of acceptance which had been deposited with him wherein were contained the reservations aforementioned. The covering communication did not request the express consent or even the acknowledgment of the signatory states, but no objections in respect of the reservations were received. Subsequently, on August 21, 1948, when the last acceptance had been deposited with the Secretary General, thus satisfying the conditions for the entry into force of the Constitution,¹⁵ the signatories were notified of this circumstance, and their observations were requested before August 27, 1948. The Secretary General also

¹⁴ "Le Gouvernement Français se réserve le droit de verser tout ou partie de sa contribution en francs ou en nature; en outre, et par application du 7ème Alinéa du Préambule de la Constitution de l'Organisation Internationale des Réfugiés qui dispose que cet organisme n'a pas de caractère permanent, les versements budgétaires prévus pour la France ne pourront être effectués que pendant une période maxima de trois fois douze mois."

¹⁵ Article 18 (2) reads: "This Constitution shall come into force when at least fifteen states, whose required contributions to Part I of the operational budget as set forth in Annex II of this Constitution amount to not less than seventy-five per cent of the total thereof, have become parties to it."

advised them of his intention to inform the parties of the entry into force of the Constitution on August 28. There being no observations, the Secretary General informed the parties accordingly.

Prior to the entry into force of the IRO Constitution, Venezuela, when signing it *ad referendum* on June 4, 1948, made a statement invoking Article 4, paragraph 3(b), which provides that in lieu of a monetary contribution, an immigration plan may be submitted to the Organization by an applicant state, involving an expenditure approximately equivalent to the contribution required of such state. The instrument of acceptance of the Constitution which was deposited by Venezuela on September 13, 1948, expressly referred to the aforementioned statement.

After the IRO General Council had elected Venezuela to the Executive Committee of the Organization, the Secretary General on September 24, 1948, deemed it expedient to inform the states parties to the Constitution that Venezuela had become a party on the date of the deposit of its instrument of acceptance.

The United States Reservation to the Constitution of the World Health Organization

On June 21, 1948, the instrument of acceptance by the United States of the Constitution of the World Health Organization, which was then already in force, was deposited with the Secretary General. The acceptance was made subject to the provisions of a joint resolution of Congress (Public Law 643, 80th Congress), Section IV whereof reads as follows:

In adopting this joint resolution the Congress does so with the understanding that in the absence of any provisions in the WHO Constitution for withdrawal from the organization, the United States reserves its right to withdraw from the organization on a one-year notice; provided, however, that the financial obligations of the United States to the organization shall be met in full for the organization's current fiscal year.

There being no clause governing reservations in the WHO Constitution, the Secretary General on June 30, 1948, informed the states parties thereto that he regretted that he was not in a position to determine whether the United States had become a party to this Constitution, but that he was prepared to be guided by the action of the World Health Assembly, since by virtue of Article 75 of the Constitution it is a competent body to settle any question concerning the interpretation or application of the Constitution. The matter was accordingly referred to the World Health Assembly.

On July 2, 1948, the following resolution was unanimously approved by the World Health Assembly:

Ratification of the Constitution by the United States of America
The Assembly
RECOGNIZED the validity of the ratification of the Constitution
by the United States of America; and
RESOLVED that the Secretary-General of the United Nations be
advised of this decision.¹⁶

Thereupon the Secretary General informed the states parties to the WHO Constitution and the United States that it was accordingly to be considered that the latter had become a party to the said Constitution as from June 21, 1948, the date of deposit of its instrument of acceptance. Subsequently, on October 7, 1948, the Director General of the World Health Organization was informed that this decision of the Secretary General was based upon his understanding that the Resolution of the World Health Assembly constituted no more than an interpretation by the competent organ that the reservation of the United States was not to be considered as inconsistent with the provisions of the Constitution. It was further emphasized in this communication that the decision was based on the circumstances of the particular case, and that it should not therefore be considered necessarily applicable to other instruments of acceptance which might be deposited subject to one or more reservations.

The South African Reservation to the Protocol Modifying Certain Provisions of the General Agreement on Tariffs and Trade

A Protocol Modifying Certain Provisions of the General Agreement on Tariffs and Trade, of which the Secretary General was designated depositary, and which entered into force for each state on signature, was drawn up on March 24, 1948, between a number of states "acting in their capacity of Signatories to the Final Act adopted at the conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment." This protocol was negotiated for the purpose of "modifying the text of certain provisions of the General Agreement on Tariffs and Trade in the light of the text of the Havana Charter of the International Trade Organisation," which was signed at the same time.¹⁷ It effects as between the parties thereto several such modifications. In particular, it adds in Section IV, a new article, namely Article XXXV, excluding in general the operation of the Agreement as between parties if they

¹⁶ World Health Organization, Official Records, No. 13, p. 341; see also pp. 77-80. For detailed discussion on the background, see Oscar Schachter, "The Development of International Law through the Legal Opinions of the United Nations Secretariat," *British Yearbook of International Law*, Vol. XXV (1948), pp. 91-132.

¹⁷ It may be noted that the General Agreement on Tariffs and Trade was not then, and is not yet, in force in accordance with its provisions for entry into force, but applies in virtue of the Protocol of Provisional Application concluded at Geneva on Oct. 30, 1947.

have not entered into tariff negotiations with each other, and if either of the parties concerned, at the time of becoming a party, does not consent.¹⁸

In signing the Protocol, the Representative of the Union of South Africa did so with the reservation "that the Government of the Union of South Africa do not accept Section IV of this Protocol inserting a new Article XXXV in the General Agreement."

The Protocol being open for signature only until May 1, 1948, and, no provision being made therein for signature subject to reservation but South Africa having been specially invited¹⁹ thereafter by the Contracting Parties to sign it, a *procès-verbal* of the South African signature was drawn up the day it was affixed, February 16, 1949, reciting these circumstances. The *procès-verbal* also recited the understanding of South Africa that its signature would not have any legal effect until the Secretary General had informed each of the Contracting Parties of it, and of the reservation made thereto, and until each Contracting Party had notified its acceptance. This *procès-verbal* and a letter setting out the reservation and requesting the views of governments on the matter, was then circulated by the Secretary General to the Contracting Parties.

A communication was then sent to the Executive Secretary of the Interim Commission of the ITO on March 10, 1949, informing him that the Secretary General was bound by the obligations which the instruments in question imposed upon him as depositary; that by international law, in the absence of a precise stipulation for a special procedure to be followed, reservations on signature or ratification of a treaty had to be communicated to the contracting parties; that the execution of the *procès-verbal* of signature on behalf of South Africa and its communication, together with the text of the reservation, to all the parties was therefore unavoidable and had in fact been effected in agreement with the representative of South Africa; that this course did not seem to be contrary to the intentions of the parties, the sole evidence of which was that, when Pakistan had ex-

¹⁸ Section IV reads as follows:

"IV. The following Article shall be inserted in the General Agreement on Tariffs and Trade after Article XXXIV:

"Article XXXV"

"1. Without prejudice to the provisions of paragraph 5(b) of Article XXV or to the obligations of a contracting party pursuant to paragraph 1 of Article XXIX, this Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if:

(a) the two contracting parties have not entered into tariff negotiations with each other, and
(b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

"2. The CONTRACTING PARTIES may, at any time before the Havana Charter enters into force, review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations."

¹⁹ For the terms of the invitation see p. 125, *post*.

pressed doubts as to the admissibility of reservations to the Protocol, the President of the conference had declared that signature subject to reservations would be effective if the reservations concerned were accepted unanimously; that in principle the contracting parties could not "*qua organ*" do by a decision that which required the individual consent of the governments of the several signatory states unless the instrument so provided, but that the governments concerned had been asked merely for their views so that, if they were so minded, the giving of collective consent to the reservation could be effected.

Some governments replied affirmatively, accepting the South African reservation, and others reserved their position in view of the fact that the question was placed on the agenda of the Third Session of the Contracting Parties. During this session on May 9, 1949, the Contracting Parties unanimously adopted a "Declaration accepting the reservation as to Article XXXV attached to the signature of the Union of South Africa to the Protocol Modifying Certain Provisions."²⁰ This Declaration referred to the following statement made by the Chairman on September 1, 1948, during the Second Session of the Contracting Parties:

This proposal is that in view of the discussion which has been held we do not take any decision one way or another on the legal issue, but that we invite the Government of the Union of South Africa to sign the Protocol Modifying Certain Provisions of the General Agreement on Tariffs and Trade, but with a reservation that they do not accept Article XXXV. We can agree now that, if the Government of South Africa signs the Protocol between now and our next session, we shall give sympathetic consideration to approval of the South African reservation at our next session without altering the legal situation as it now exists. This could then have the effect that the other Contracting Parties would continue to regard themselves as bound by, and having the right to apply the provisions of Article XXXV, which do not require any of them to apply the General Agreement, or alternatively Article II of that Agreement, to another contracting party if there have not been tariff negotiations between the two parties and if either of the parties had made a declaration to that effect, while South Africa would continue to regard themselves as not being bound and would presumably apply the General Agreement to all contracting parties, irrespective of whether or not tariff negotiations have taken place between the parties.

The Declaration then recited the fact that:

THE CONTRACTING PARTIES UNANIMOUSLY:

DECLARE that no objection is raised by any contracting party to this reservation, it being understood that the relevant relationships among the contracting parties will be as set forth in the above statement by the Chairman.

²⁰ U.N. Doc. GATT/CP.3/19, p. 3.

The Executive Secretary of the Interim Commission of the ITO notified the Secretary General of this Declaration and the latter then informed the Contracting Parties separately of the contents of the notification and stated it to be his understanding "that all signatories of the . . . Protocol have acquiesced to the reservation subject to which the Protocol was signed on behalf of the Union of South Africa." A number of governments replied to the effect that that was also their understanding, so completing a formal exchange of notes.

The Southern Rhodesian Reservation to the Protocol Modifying Part I and Article XXIX of the General Agreement on Tariffs and Trade

A Protocol Modifying Part I and Article XXIX of the General Agreement on Tariffs and Trade, of which the Secretary General was designated depositary, was drawn up on September 14, 1948, between certain states "acting in their capacity of contracting parties to the General Agreement on Tariffs and Trade." The principal effect of this Protocol was the introduction of a new Article XXIX into the General Agreement to take account of the Havana Charter of the International Trade Organization, which was signed on March 24, 1948. This article involved *inter alia* an obligation upon the Contracting Parties "to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter pending their acceptance of it in accordance with their constitutional procedures."

On November 19, 1948, Southern Rhodesia notified the Secretary General of its acceptance of this Protocol. However, this notification was accompanied by the following statement:

The Government of Southern Rhodesia desires to draw attention to the fact that it did not accept the Special Protocol amending Article XXIV of the General Agreement on Tariffs and Trade signed at Havana on 24 March 1948. Accordingly, while it is prepared in terms of Section I of the new Article XXIX to observe the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter, the Government of Southern Rhodesia desires to record that it finds the present form of the interpretative note in Annexure P to paragraph 5 of Article 44 of the Havana Charter to be unacceptable and, therefore, reserves its position with regard to Article XXIV of the General Agreement on Tariffs and Trade.

The said Paragraph 5 of Article 44 is to be found in Chapter IV of the Havana Charter, and the annexes thereto, including Annex P, form, according to Article 105, an integral part of the Charter. The interpretative note to Paragraph 5 of Article 44 is identical with the interpretative note relating to Article XXIV of the General Agreement, but otherwise Article XXIV is not involved in the Protocol Modifying Part I and Article XXIX. In the light of these facts the Secretary General assumed that the

last phrase of the statement by Southern Rhodesia should have referred more correctly to Article XXIX, this being the article to which the particular Protocol related. And since Southern Rhodesia regarded the aforementioned interpretative note as "unacceptable," which it would otherwise be bound to observe by virtue of accepting Article XXIX, the Secretary General considered the statement as a reservation to the said Protocol. He then informed Southern Rhodesia and the other Contracting Parties that he was unable to accept the notification of acceptance as definitely constituting an instrument of acceptance unless all of them consented to the reservation, and that accordingly he requested their views on the matter.

Some governments expressly stated that they had no objections to the reservation, and others reserved their position in view of the fact that the question was placed on the agenda of the Third Session of the Contracting Parties. A similar procedure to that taken regarding the South African reservation previously referred to, was then followed, and during this session on May 9, 1949, at a meeting attended by all the Contracting Parties, a declaration was adopted

taking note of the explanation by the representative of Southern Rhodesia, that the statement accompanying the instrument of acceptance by his Government of the Protocol Modifying Part I and Article XXIX was not intended as a reservation of its acceptance of the Protocol and that his Government regards its acceptance as unconditionally binding

and unanimously declaring the acceptance "valid and effective."²¹ The Secretary General accordingly informed each Contracting Party that the notification of acceptance of November 19, 1948, was "considered as a duly deposited instrument of acceptance in terms of paragraph 4 of the Protocol."

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide

On December 16, 1949, the Union of Soviet Socialist Republics, the Ukrainian Soviet Socialist Republic and the Byelorussian Soviet Socialist Republic signed the Convention on the Prevention and Punishment of the Crime of Genocide "with the reservations regarding Articles IX and XII stated in the special *procès-verbal* drawn up on signature of the present Convention."²² Similarly, on December 28, 1949, Czechoslovakia signed the Convention "with the reservations regarding Articles IX and XII stated in the special *procès-verbal* drawn up on signature of the present Convention."

²¹ U.N. Doc. GATT/CP.3/19, p. 5.

²² See U.N. Press Release L/110, Dec. 16, 1949.

The special *procès-verbaux* which were drawn up for each signatory were couched in identical terms.²³

The Secretary General on December 28, 1949, notified each Member of the United Nations and each of the non-member states²⁴ contemplated in Article XI of the Convention, of the reservations made by the Union of Soviet Socialist Republics, the Ukrainian Soviet Socialist Republic, and the Byelorussian Soviet Socialist Republic. On December 29, 1949, the Secretary General sent similar notifications regarding the reservations made by Czechoslovakia. A certified copy of each *procès-verbal* was attached to all the notifications. In addition, the Secretary General informed the five Member States which had ratified the Convention, namely, Australia, Ecuador, Ethiopia, Iceland and Norway, that he would like to be informed at the earliest possible opportunity of their attitude with regard to the said reservations. He further advised them that it would be his understanding that all states which had ratified or acceded to the Convention would have accepted these reservations unless they had notified him of objections thereto, prior to the day on which the first twenty instruments of ratification or accession should have been deposited.²⁵

²³ Each special *procès-verbal* contained the following statement:

"At the time of signing the present Convention the delegation of the [USSR, Ukraine, Byelorussia, Czechoslovakia] deems it essential to state the following:

"As regards Article IX: the [USSR, Ukraine, Byelorussia, Czechoslovakia] does not consider as binding upon itself the provisions of Article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, [the USSR, Ukraine, Byelorussia, Czechoslovakia] will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

"As regards Article XII: the [USSR, Ukraine, Byelorussia, Czechoslovakia] declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories."

²⁴ See the resolution adopted by the General Assembly on Dec. 3, 1949, regarding the invitations to be addressed to non-member states to become parties to the Convention on the Prevention and Punishment of the Crime of Genocide pursuant to Art. XI of the Convention. U.N. Doc. A/1202, Dec. 6, 1949.

²⁵ Under Art. XIII of the Convention the Secretary General is required on the day when the first twenty instruments of ratification or accession shall have been deposited to draw up a special *procès-verbal* and transmit a copy of it to each Member of the United Nations and each of the non-member states contemplated in Art. XI. The Convention will come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

EDITORIAL COMMENT

NAZI LAWS IN UNITED STATES COURTS

One of the first cases to come before United States courts concerning the despoliation of Jews in Germany under the Nazi régime was the case of *Bernstein v. Van Heyghen Frères*, 163 F. 2d 246 (1947).¹ Bernstein, a German Jew, was the owner of all the stock of the Bernstein Steamship Line, a German company. In January, 1937, he was arrested and imprisoned by "Nazi Gestapo" in Hamburg. Under duress of "Nazi officials," threats of bodily harm, indefinite imprisonment and business ruin, he assigned, while still in prison, his stock to one Boeger, "a Nazi designee," who took possession of all the assets, including the company's ships, without compensation and transferred same to defendants, a Belgian concern which was said to have full knowledge of the duress. The assignment took place in the British occupied zone of Germany. He was released in July, 1939, upon payment of a "ransom" by his family and allowed to leave Germany. He became naturalized in the United States in 1940.

Plaintiff demanded damages, loss of profits, and insurance of £100,000 received by defendant on the loss of a vessel in 1942. The United States District Court dismissed the case on the ground that the wrong was an act of the German Government committed in German territory and not subject to judicial review here. On appeal the Circuit Court of Appeals affirmed the decision below by a two to one vote, Judge Clarke dissenting.

It may be assumed that the plaintiff could not recover unless he showed he was entitled to the *res* and that the transfer to Boeger and by Boeger was illegal under the then German law. It appears that he only attempted the latter by pleading duress, although duress was countenanced under the Nazi decrees which came into force in 1938.

Judge Learned Hand speaking for the court, in the first place, deemed it clear, though some of the evidence was "fragile," that plaintiff had alleged that he was a victim of persecution by officials of the Third Reich. Although, as the court was informed, no non-Aryan laws might have been passed until December, 1938, and the transfer might have occurred before that time, and a German court might have disallowed the transfer, this, however, was irrelevant because "We have repeatedly declared, for over a period of at least thirty years, that a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such. [Citations of Circuit Court decisions.] We have held that this was a necessary corollary of the decisions of the Supreme Court, and if we are mistaken the Supreme

¹ Digested in this JOURNAL, Vol. 42 (1948), p. 217.

Court must correct it,"² citing *Underhill v. Hernandez*, 168 U. S. 250, and *Oetjen v. Central Leather Co.*, 246 U. S. 297.

At this point it may be interjected that the non-inquiry doctrine has had a somewhat checkered career in the United States courts. A maze of cases descended upon the courts as a result of Soviet confiscation and nationalization decrees. Before recognition of the Soviet Government by the United States in 1933, the courts, generally speaking, disregarded the decrees so far as concerned companies or property *in the United States*, but did support them in respect of companies and properties located *in Russia*. After recognition and the concurrent Litvinoff assignment of Russian rights to the United States, the courts were still disinclined to give effect to such decrees concerning property *in the United States*, as repugnant to public policy. But the Supreme Court stepped in and held that the United States received good title under the Litvinoff assignment which overrode any State policy to the contrary. This, so far as is known to the writer, is the first instance of enforcing a foreign confiscation decree on property *in the United States*.³

As to Hitler's anti-Jewish decrees, the lower New York courts were scathing in denunciation, but the Court of Appeals held that a German contract to be performed in Germany should be construed according to German law however objectionable. "So long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws." (*Banco de Espana v. Federal Reserve Bank*, 114 F. 2d 438.)

In the second place, Judge Hand questioned whether the Executive, "the authority to which we must look for final word in such matters," has declared that this "commonly accepted doctrine" does not apply.

Since the plaintiff argued that the Government had already acted to relieve this restraint, the court considered the announcements of policy contained in certain official acts of the United States and other victorious Powers before the court,⁴ and held that these spoke *in futuro* and so far

² Petition for certiorari was denied by the Supreme Court, 332 U. S. 772.

³ *Petrogradsky v. National City Bank*, 253 N. Y. 23; *Salimoff v. Standard Oil Co.*, 262 N. Y. 220; *Vladikavkajsky Ry. v. N. Y. Trust Co.*, 263 N. Y. 369; *U. S. v. N. Y. Bank and Trust Co.*, 77 F. 2d 866; *U. S. v. Belmont*, 85 F. 2d 542, 301 U. S. 324; *U. S. v. Pink*, 215 U. S. 203. See discussion of cases in 23 N. Y. U. Law Quart. Rev. (1948), Notes, p. 311; also by Jessup in this JOURNAL, Vol. 31 (1937), p. 481, and *ibid.*, Vol. 36 (1942), p. 232; Borchard, *ibid.*, Vol. 31 (1937), p. 675; and King, *ibid.*, Vol. 42 (1948), p. 811. It may be noted in passing that the confiscation of property of aliens is regarded as a violation of international law. C. P. Anderson, this JOURNAL, Vol. 21 (1927), p. 525.

⁴ The Allied Declaration of June 5, 1945, assuming "supreme authority with respect to Germany including all the powers possessed by the German government, the High Command or any state, municipal or local government or authority"; the Potsdam agreement of Aug. 2, 1945, establishing the Supreme Council and enacting that all Nazi laws of the Hitler régime discriminating in respect of "race, creed, or political opinion

were only prospective in their operation. No Restitution Law had yet been approved. Moreover, the laws for the American Zone were "in a sense irrelevant," since the Bernstein Line and the assignment had their *locus* in the British Zone, and the court had no access to the British laws of that zone. The court continued: "The only relevant consideration is how far our Executive has indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar; some positive evidence of such an intent being necessary." Certainly, the court added, it is no indication of such intent that the Executive may have provided for adjudication *locally* where for the most part the cases will arise.

As an additional reason for maintaining the doctrine in question the court indicated that claims for this property wrongfully seized in Germany would become an item in the reparations account between Belgium and Germany, especially if the plaintiff succeed in this suit, and that therefore these matters should be left for settlement in the peace treaty, in the absence of the most explicit evidence of a contrary purpose of the victorious Powers.

Third, even if the British Military Government had gone as far as would in our opinion be necessary, said Judge Hand, we are not ready to agree that it would relieve a New York court from the need of an equivalent assent of our own Executive. Plaintiff nowhere suggests that the British have passed for their zone any legislation different from our zone.

Finally, as to the argument that the Nuremberg Charter and Judgment declared such acts to be crimes,⁵ this does not aid the plaintiff, for we have assumed the New York law would not approve the validity of the transfer even if valid in Germany. Nor regardless of this does it overcome "the real obstacle in his path" that the New York court is not permitted to apply that law, since the claim along with all other such claims, is reserved for adjudication as part of the final settlement with Germany.

Judge Clarke dissented strongly on the ground that our Executive has repudiated the recognition of the Hitler Government and declared its acts null and void. "We have no precedent to govern this case. In short a new one must be formulated." But first he thought the court should order a trial to clarify the facts and issues in this record, and also request of the State Department a definition of Executive policy in the premises, and a precise recital of the instruments nullifying Nazi laws. The instruments discussed throw light on Executive policy; Executive policy was at

shall be abolished. No such discrimination, whether legal, administrative or otherwise shall be tolerated"; Military Government Law No. 1 and Law No. 52 of the United States Zone. Judge Clarke also mentioned the Directive of April, 1945, and Allied Council Law No. 1.

⁵ It appears from the Judgment at Nuremberg that "The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter . . ." (Judgment, p. 84).

least in formulation. "If the policy of our Executive is one of non-recognition of Nazi oppression and of restitution to the Jews, I think we are bound to observe it in our courts."

Before the Van Heyghen case was decided in 1947, Bernstein brought a similar suit in June, 1945, in the United States District Court against the Holland-American Line. The facts related as to duress are essentially the same. After an appeal the case appears to be still pending in the District Court (*Bernstein v. Holland-America Line*, 76 F. Supp. 335; 79 F. Supp. 38; 173 F. 2d 71).⁶ In this proceeding the attorneys for the plaintiff, taking a hint from the Van Heyghen decision and Judge Clarke's dissent, inquired of the Department of State whether it might care to express its view concerning the Executive policy as to the exercise of jurisdiction by the courts of this country in such cases. On April 13, 1949, the Acting Legal Adviser of the Department replied:

This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls. . . .⁷

The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.⁸

A copy of this letter was sent to the other parties to the suit and to the judge of the court.

It may be noted that it has not been unusual in the past for the Government to set forth its policies in communications to courts. In the *Transandine Case*⁹ the Government practically told the New York court how it should decide the legal questions, but the court made its own decision that the State and Federal policies were in accord, adding, however, that this sort of thing might have "serious consequences in other cases."

⁶ Digested in this JOURNAL, Vol. 42 (1948), p. 726, Vol. 43 (1949), p. 180, and Vol. 44 (1950), p. 182.

⁷ He listed the following instruments in support of this statement: Inter-Allied Declaration of Jan. 5, 1943; Gold Declaration of Feb. 22, 1944; Potsdam Agreement of Aug. 2, 1945; Directives to U. S. Commander-in-Chief, April, 1945 and July 11, 1947; Allied Control Council Law No. 1; Military Government Laws Nos. 1, 52 and 59. He continued:

"Of special importance is Military Government Law No. 59 which shows this Government's policy of undoing forced transfers and restituting identifiable property to persons wrongfully deprived of such property within the period from January 30, 1933 to May 8, 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism. Article 1 (1). It should be noted that this policy applies generally despite the existence of purchasers in good faith. Article 1 (2)."

⁸ Dept. of State Bulletin, Vol. XX, No. 514 (May 8, 1949), pp. 592-593.

⁹ *Anderson v. Transandine Handelsmaatschappij*, 289 N. Y. 9.

And courts are inclined in immunity cases to hang upon the words of the State Department in factual situations which they are perfectly capable of handling by regular procedure.¹⁰

In this principal case Judge Hand relied in the first instance on the act of state doctrine. Whatever the origin and early application of the doctrine, it has become by repetition, as John Bassett Moore says, "a settled principle that courts of one country will not undertake to judge the legality of acts of governmental power done in another country."¹¹

In the precedents cited by the court and others of the same character,¹² the doctrine is predicated mainly (1) upon the existence of a government which had been recognized by the forum government and (2) upon the avoidance of thwarting the foreign policy of the latter government.¹³

As to the first point, there was clearly no government at all in Germany when the Van Heyghen suit was begun in 1946; it had been destroyed in the war and its functions and powers assumed by the victorious Allies. But in the period 1937 through July, 1939, during which the acts of state occurred, the Hitler Government had not been repudiated by the United States. Relations were undoubtedly strained under American protests regarding the treatment of Jews in Germany and the withdrawal of the American Ambassador in November, 1938. Nevertheless, the American Chargé and his staff remained on for three years conducting diplomatic business as usual with the German Government. The United States in effect recognized the annexation of Austria in April, 1938, and agreed with Germany to extend extradition to Austria in November, 1939. United States aid of arms and lend-lease to the Allies and embargoes of war materials to other countries did not begin until after war opened in Europe. The destroyer deal with Britain occurred in the autumn of 1940; the U. S.-German Claims Commission was sitting regularly in Washington until the spring of 1939, and Roosevelt's "shoot on sight" order came in September, 1941.

It must be assumed, therefore, that the Hitler Government was recognized by the United States and diplomatic relations, if not cordial, at least not hostile, continued during the period in question.

¹⁰ *Republic of Mexico v. Hoffman*, 324 U. S. 30; *The Navemar*, 303 U. S. 68; *Ex parte Muir*, 254 U. S. 522; *Ex parte Peru*, 318 U. S. 578.

¹¹ This JOURNAL, Vol. 27 (1934), p. 607. Mr. Moore was of counsel in the early stages of the Underhill case.

¹² Besides the Underhill and Oetjen cases *supra*: *Ricaud v. American Metal Co.*, 246 U. S. 304; *Ex parte Peru*, 318 U. S. 578; *Mexico v. Hoffman*, 324 U. S. 30; *The Navemar*, 303 U. S. 68; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347; also several Circuit Court and State court decisions.

¹³ It may be recalled that the act of state doctrine has not been applied to acts of the judicial arm of government. Courts frequently scrutinize decisions of foreign courts for lack of jurisdiction, fair procedure, fraud and other evils disfavored by the public policy of the forum.

As to the second point, which speaks as of the time of the suit, how would a decision for plaintiff have adversely affected the then foreign policy of the United States? Judge Hand held that the instruments¹⁴ submitted on foreign policy were not a positive indication of an intent to relax the act of state doctrine. They were, he said merely prospective in operation. Judge Clarke thought the evidence showed at least a policy "in formulation" looking to restitution of duress properties. Rereading these documents, the writer must agree that they in a sense speak *in futuro* by the use of the word "shall"; but "shall" may also be taken as a command, and as showing an intention to annul Nazi laws and to reconstitute "duress properties." Thus Control Council Law No. 1 merely repealed anti-Semitic laws, though not retroactively. While the Directive of April, 1945, envisaged the eventual restoration of "duress properties," the actual Restitution Law (Law No. 59 of the American Zone) for that purpose was yet to be issued. Until that time the duress properties were simply held in possession and control. It was therefore for the court to decide whether to make inquiry of the State Department or to render a decision and let the Supreme Court correct it. It took the latter course and *certiorari* was denied.

Of the additional documents listed in the Department's letter of April 13, 1949, the first two would have added little as to foreign policy, and the important fifth and ninth documents were published shortly after the decision was rendered. Doubtless they would have been produced had Judge Clarke's view prevailed, and probably would, together with the Department's letter, have determined the question of policy. For they definitely provided for the "speedy restitution of identifiable property (tangible or intangible)" wrongfully taken between January 30, 1933, and May 8, 1945, notwithstanding purchase in good faith (with a few exceptions).¹⁵

The foreign policy of the United States with respect to Germany or the American Zone is, however, not an isolated matter. There were other imponderables involved. The *locus* of duress and ownership of the property was in the British Zone, whose laws were apparently unknown to the court.¹⁶

¹⁴ See footnote 4 above.

¹⁵ See the Special Report of the Military Governor, November, 1948 for the text of other Laws and Regulations. Such restitution was to be made by courts in Germany and not elsewhere. Up to this time the legislation in the American Zone provided only for restitution of identifiable tangible and intangible property (Law No. 59). On Sept. 30, 1949, the German Laender comprising the U. S. Zone promulgated legislation whereby certain classes of persons who suffered monetary and other losses through persecution by the Nazi régime, may receive indemnification for losses falling outside the previous restitution legislation. (State Department, Press Release No. 759, Oct. 3, 1949; Bulletin, Vol. XXI, No. 537 (Oct. 17, 1949), pp. 591-592.)

¹⁶ Also it had been found impossible to make them uniform for all zones or even for two zones (Special Report of Military Governor, November, 1948, p. 22).

If it be assumed that the British laws follow the American Zone laws, then should they be applied to this case and if so, is the *res* here "identifiable property"? Is it the property of the plaintiff or of the steamship line of which he owned the stock? The *res* is the proceeds of property never owned by the plaintiff but by his company. Where would a decision for the plaintiff leave the Beligan company and would it arouse the ire of the Belgian Government in its behalf? Perhaps Belgian laws and policy were involved in the purchase by the Belgian company. Would a decision for the plaintiff have interfered with the United States policies in these directions, or with the general question of reparations in respect of all three countries? Judge Hand wisely considered the question of reparations and, while this was not at first an impressive consideration to the writer, the study of the international aspects of this case leads to the conclusion that such cases as this one cannot be adequately handled by local courts of any one country applying principles of local law, but should go before an international tribunal of some sort to be established and governed by mutual agreement of the governments concerned.

While at first blush it seems incongruous that the United States policy in Germany should favor restitution and indemnification for Nazi atrocities to the Jews and that the court in the Van Heyghen case should deny relief here for the same kind of Nazi acts, yet considering the complex international considerations involved in this case, it seems on the whole better for the court to recognize its limitations than to try a case in which it lacked competence to do full justice in an international sense.

L. H. WOOLSEY

✓ THE SWING OF THE PENDULUM: FROM OVERESTIMATION
TO UNDERESTIMATION OF INTERNATIONAL LAW

The history of man's spiritual activities, of his attitude toward the world and life as a whole as well as toward particular problems shows a continuous swing of the pendulum from one attitude to the opposite one. Philosophically we see a change between the different attitudes which can be taken—all outlined already by the thinkers of ancient Hellas. It may be that the first attitude has reached its fullness, that its possibilities seem, for the time being, exhausted. It may be that the first attitude has seemingly been disproved by historical events and no longer seems adequate to the needs of a changed situation. Then trends and tendencies appear which may ultimately climax in the establishment of the opposite attitude. And as, in order to establish the new attitude, very likely a distorted picture of the former one will be given, and as the new attitude, once established, itself often goes to extremes, the pendulum not only swings from one side to the other, but from one extreme to the other.

Thus classicism is followed by romanticism in the field of art, literature

and music. The pendulum of philosophy swings between idealism and realism, between idealism and materialism; only the spirit counts, says Hegel; there is only matter, says Marx. Centuries of faith in reason and natural law are followed by the utmost positivism of Comte. In the realm of law natural law with its extravagant claims is followed by strict legal positivism. The optimism of the nineteenth century is followed by the pessimism of the twentieth.

This swing of the pendulum is, of course, particularly great in periods of fundamental crisis like our present epoch, where the very survival of our Western Christian civilization is in question, where the very ideals on which this civilization rests are questioned and attacked, where, in consequence, everything is insecure. This insecurity and pessimism pervade the attitudes toward all problems. Doubts as to the fate of our culture can be found already in Pascal, they become pronounced in Kierkegaard, they are dogmatically laid down by Spengler, followed by Toynbee. Insecurity is the mark of our epoch and it shows itself everywhere in musical atonalism just as much as in Heisenberg's insecurity principle, in the insecurity of human relations within or between the states. Firm faith in science and progress is followed by doubt; natural sciences and reason are minimized in favor of intuitionism. The long appeal to reason is followed by an appeal to the irrational. The pessimism of an age of crisis makes men pessimistically doubt whether social relations are soluble at all.

As far as the attitude toward international law goes, a period of overestimation, so characteristic for the years between the two World Wars, is followed by a period of underestimation. It is, to a great extent, this change of attitude which spells the difference between the League of Nations and the United Nations.

At the end of the first World War, fought under the leadership of Woodrow Wilson "to end war," boundless optimism prevailed. There was everywhere, in victors, neutrals and vanquished, not only the will to achieve a better world through international law, but also the firm conviction that it could be done. Hence, the ambitious experiment of the League of Nations. Away with power politics! No more secret diplomacy, no more entangling alliances, no longer the forever discredited balance of power, no more war! Democracy and the rule of international law will change the world. The Covenant puts international law "in the actual conduct among Governments" and justice first, insists on disarmament as the way to peace, emphasizes the trust principle in the Mandates.

In all the dealings of the League international law was at the heart of the discussion. Idealistic approach, optimism, emphasis on international law created the "Geneva atmosphere." This writer who was so often in Geneva between 1920 and 1932 knows it from experience. One must have been there in order to evaluate the impression, the genuine enthusiasm all around, when Aristide Briand made his famous speech: "*Plus de*

mitrailleuses!" The legal department of the League played a great rôle; the Permanent Court of International Justice was frequently resorted to. The Mandates Commission was primarily moved by legal considerations. Legal arguments were the core of every debate; every delegate knew that he must justify his attitude legally. Hence, greatest importance was given to international law in the foreign offices. Many a delegate traveled to Geneva with a whole library of international law and always well accompanied by legal advisers. In the Hungarian-Rumanian Optants' Dispute both parties tried to produce the greatest number of opinions by leading international lawyers.

And, outside of Geneva, the very existence of the League, the foundation of the Permanent Court of International Justice, created enthusiasm and led to an overestimation of the efficacy of international law. An enormous number of legal studies on the League were published in all languages. The teaching of international relations centered on international law and the League. The Rockefeller Foundation created the Geneva Institute, the Carnegie Endowment the Hague Academy of International Law. The literature on international law was greatly influenced by this general trend of optimism.

The Covenant did not go to extremes; it recognized realistically that war can be successfully eliminated only insofar as peaceful substitutes are created; it laid down only "obligations" (in the plural) not to resort to war. Article XVI contains sanctions in a strictly juridical sense only against a member which had violated its obligations under Articles XII, XIII or XV. The Covenant does not abolish war; is by no means based on the doctrine of *bellum justum*; it does not deal with the just cause of a war, but contains merely procedural obligations. Mr. Kellogg himself never made extravagant claims for the Kellogg Pact.

Even under this optimism the facts were, from the beginning, different. Old-fashioned alliances against Germany and Hungary were concluded "*dans le cadre de la Société des Nations*," under the escape clause of Article XXI. The delegates to the League had mostly the interest of their own states in view, so that Scelle could bitterly complain of "merely multinational, not international gatherings." Geneva oratory was contradicted by what the states did. The Corfu incident in 1923 gave a foretaste of the unreality of "collective security" in the face of a Great Power.

Then came the flagrant violations of the "thirties," climaxing in the second World War. They had, as a first effect, the going to extremes, especially by a literature of wishful thinking. Fancy interpretations of the Kellogg Pact were put forward; the more "collective security" was shown to be non-existent, the more the utopian writers emphasized it. The more the facts were in contradiction to their writings, the more lyrical they grew. The confusion between *lex lata* and *lex ferenda*, the mistaking of often contradictory trends and tendencies for new rules of international

law already established, the mistaking of Geneva—or Pan American—oratory for facts grew worse.

The events of the "thirties" also had the opposite effect: the time was ripe for the swing of the pendulum to the other extreme, from overestimation to underestimation of international law, from the emphasis on international law to the emphasis on power, from optimism to pessimism, to the new "realistic" approach. Already books published in the "thirties" show this new approach.¹

During the second World War the new "realism" appeared in state action and literature. The three leading statesmen on our side were all realists. The bases-destroyer deal and Lend-Lease Act were moves of a realistic policy; legal considerations were less prominent. Not peace through law, but security through power, became the dominant idea and shaped the thinking as to a new world organization, built upon "more realistic bases" than the League. Power, held by the Big Three, and, therefore, their predominance, became essential. In the literature, many war books not only condemned German geopolitics as aimed at imperialism, but tried also to brand it as a "pseudo-science." But at the same time attention was directed again to the writings of Sir Halford MacKinder—exactly from whom Karl Haushofer had started—and an American geopolitics was presented.² In the field of international law, important writers³ came to the conclusion that it is for all practical purposes dead.

The Dumbarton Oaks Proposals do not even mention international law. Only the Chinese proposals and widespread criticism brought about the inclusion of international law in the Charter of the United Nations. The "realism" of the Charter can be seen in the Trusteeships, as distinguished from the League Mandates, in the relative unimportance of the disarmament problem, in the powers of the Security Council as well as in the "veto" given to the permanent members, in the fact that the Security Council, deciding "upon the existence of any threat to the peace, breach of peace or act of aggression," is not bound by rules of international law, so that its "measures" must not necessarily be sanctions in the juridical sense, contrary to Article XVI of the Covenant. Also the practice of the United Nations is certainly very different from that of the League. Legal questions play a subordinate rôle at the United Nations and in diplomatic correspondence. The International Court of Justice is not overburdened; whether its advisory opinion on the admission of new members will be

¹ See, e.g., F. Schuman, *International Politics* (1st ed., 1933); Simonds and Emeny, *The Great Powers in World Politics* (1939); and the writings of E. H. Carr in England.

² Nicholas J. Spykman, *American Strategy in World Politics* (New York, 1942).

³ Friedmann, *What's Wrong with International Law?* (London, 1941). See also papers and discussions during the war—Vols. XXVI to XXVIII (1940-1942) of the *Transactions of the Grotius Society*.

heeded, remains to be seen. The oratory contrasts strikingly with that of Geneva. If the most undiplomatic language, bitterness, invectives and political propaganda constitute realism, then there is plenty of realism at Lake Success (*lucus a non lucendo*).

The new "realism" makes itself felt everywhere. International law as a special subject has been dropped as an examination topic for entrance into the U. S. Foreign Service. It is significant that the Rockefeller Foundation and the Carnegie Endowment, although certainly many other motives were of influence, have withdrawn their subventions from the Geneva Institute and the Hague Academy. Although the Carnegie Endowment—traditionally a bulwark of international law—continues to do much for international law, for publications on and the teaching of international law, the new "realistic" tendencies can be seen in top decisions of recent years. The whole trend in teaching international relations shies away from international law and puts the focus on politics and power.⁴ The Institutes at Yale and Princeton emphasize the "realistic" point of view. So does the new journal *World Politics*. Professor Harold Sprout states that earlier the study of international relations was carried on "in the sterile atmosphere of international law."⁵ Excellent international lawyers like P. E. Corbett and Hans J. Morgenthau have, so to speak, "deserted" international law and gone with flying colors into the "realistic" camp. The latter has given us, one might say, the bible of "realism."⁶ The balance of power is being honored again and Macchiavelli quoted with approval.

Yet, even under the United Nations and in the literature, not everything is "realism." The United Nations is based on the belief of the continued coöperation of the "Big Three," although a study of world history from oldest times could have shown that alliances of heterogeneous states are likely to disintegrate, as soon as the common enemy is vanquished. It was not foreseen that the "realistic" veto may lead to paralysis. It was not seen that "collective security" and other tasks cannot be fulfilled by an association of "sovereign equal States," which has scrupulously to respect the "*domaine réservé*" of the members. The facts are as under the League. As there is no collective security, new alliances and counter-alliances are concluded, shamefully veiled as being "within the framework of the U.N."—only the language has changed since League times from French to English. And both camps again make use of the two escape clauses—the West of Art. 51, the East of Art. 107.⁷ Far-reaching utopian

⁴ See Wm. T. R. Fox, "Interwar International Relations Research," *World Politics*, Vol. II, No. 1 (October, 1949), pp. 67-79; and Frederick S. Dunn, "The Present Course of International Relations Research," *ibid.*, pp. 80-95.

⁵ *World Politics*, Vol. I, No. 3 (April, 1949), p. 404.

⁶ Hans J. Morgenthau, *Politics Among Nations* (New York, 1948). See below, p. 219.

⁷ G. Schwarzenberger, "The North Atlantic Pact," *The Western Political Quarterly*, Vol. II, No. 3 (September, 1949), pp. 310-11.

schemes appear also under the reign of the United Nations and a new utopian trend—"world government" and so on—can be seen in some parts of the literature.

Insofar as the new "realism" tends to correct mistakes of the earlier attitude, insofar as it is directed against the *overestimation* of international law, it is to be welcomed. International lawyers must not forget that international law does not operate in a vacuum, that even proposals *de lege ferenda* have sense only within the boundaries of political possibilities of being realized at a particular juncture of history. They must not confuse the law that is with their wishful thinking. They must recognize that many of their utopian proposals presuppose a world state under world law, whereas the present international community is only a loose society of sovereign states under international law and is likely to remain such for the foreseeable future. Good international lawyers, who, as lawyers, are trained in looking to the law that is and to realities, rarely make this mistake. Thus Edwin D. Dickinson⁸ has given us a severe—perhaps, too severe—critique of positive international law. Alf Ross⁹ always urges a "sober, realistic attitude" toward international law. No one will say that J. L. Brierly¹⁰ neglects the realities.

But insofar as the new "realism" tells us that there is nothing but power and that international law is "sterile," insofar as it tends toward an *underestimation* of international law, it must be opposed with all energy. In so doing, it sins against its own "realism." It is not true that problems of international law "are largely irrelevant." International law is a factor in international relations: Brierly,¹¹ and Jessup in his *A Modern Law of Nations*, have recently written pages proving convincingly that this is so. Municipal law, too, moves in a political atmosphere. Will this country, therefore, accept Hitler's "Might is right" or Lenin's "Law is politics"? *Ubi societas, ibi jus*. The law has necessarily to play an important rôle, and so has international law. Extremes are always wrong: the truth lies in the golden middle way. The correct attitude must be equidistant from utopia, from superficial optimism and overestimation and from cynical minimizing; neither overestimation, nor underestimation: International law is "neither a panacea nor a myth."¹²

JOSEF L. KUNZ

⁸ "International Law: an Inventory," California Law Review, Vol. 33, No. 4 (December, 1945), pp. 506-542.

⁹ A Textbook of International Law (1947).

¹⁰ The Outlook for International Law (Oxford, 1947).

¹¹ *Op. cit.*

¹² J. L. Brierly, The Law of Nations (4th ed., Oxford, 1949), p. v.

AN INTERNATIONAL RIGHT OF REPLY

Current campaigns of mutual vilification conducted by nations through platform, press and radio present a spectacle without precedent in peacetime history. In spite of time-honored traditions of extreme courtesy and strict conformance with the rules of the protocol, present-day diplomats indulge in mutual recriminations of a virulent character, so that even in the United Nations the defamation of persons in high places or the states they represent are of frequent occurrence. The consequences to the cause of mutual understanding and peace are not good.

In an effort to remedy this situation, two proposals have figured prominently in recent discussions. One, championed mainly by the United States and Britain, is based on the assumption that the best way to overcome the dangers caused by the publication of false reports, incendiary preachings or war-mongering messages is to assure to the public more and freer sources of information, so that it may judge for itself of the validity of the conflicting views.¹ The other remedy, proposed by Soviet Russia and its satellites, eschews any real freedom of information, but would meet the dangers of propaganda by more drastic methods, notably through an obligation on the part of each state to curb objectionable publications and to punish the offenders through criminal procedures.² This plan is opposed by the Western democracies on the ground that it would legalize peacetime censorship, which all free states abhor, and would open the door to totalitarian controls over all media of information.³

In addition to the two remedies just mentioned, a third has been proposed, and was approved by the General Assembly last spring without attracting much attention among students of international law and organization. This is the international right of reply set forth in the Convention on the International Transmission of News and the Right of Correction, approved on May 14, 1949, by the General Assembly.⁴ The plan was originally proposed by France at the Geneva Conference on Freedom of Information and of the Press in 1948, and was there approved as the so-called "French Convention."⁵

The idea of a right of reply available to persons claiming to be injured by defamatory publications is not new. Like most schemes for the regu-

¹ U. N. Conference on Freedom of Information, Report of the U. S. Delegates with Related Documents (Department of State Pub. 3150, Int. Org. and Conf. Ser. III, 5), pp. 2 ff.; John B. Whitton, "The United Nations Conference on Freedom of Information and the Movement against International Propaganda," this JOURNAL, Vol. 43 (1949), p. 73.

² U. N. Docs. E/856; E/Conf.6/C.4/18.

³ *Supra*, note 1, Report of U. S. Delegates, p. 3.

⁴ United Nations Bulletin, June 1, 1949, p. 592; General Assembly, 3rd Sess., Part II, Official Records, April 5-May 18, 1949, pp. 21 ff.

⁵ *Supra*, note 1, pp. 9 and 18; Whitton, *loc. cit.*

lation of relations between states, it was borrowed from domestic legislation, above all from the French laws, the first of which appeared in 1819.⁶ Anyone named specifically in a publication is entitled to demand the insertion of a reply, of a specified character and length, in the same organ. This right of reply is open even to the author of a book or play who objects to a published critique. Of course, there is no guarantee of truth through this procedure, but the public is enabled to judge of the veracity and soundness of the opposing views. This law is still in force.⁷ Recently the French courts refused to extend the right of reply to statements made by radio broadcast.⁸

Since the right of reply offers a remedy much more prompt, less costly and less difficult to obtain than the usual action for libel, it is not surprising that the example of France has been followed in approximately 30 countries.⁹ But Britain and the United States in general still cling to the older remedy of an action for libel, despite its admitted weaknesses and defects.¹⁰ The 30 countries mentioned have adopted either (1) the French type of right of reply; (2) a compulsory retraction—the enforced publication in the organ in which the objectionable article appeared of a revised version of the facts; or (3) some combination of the two.¹¹ In the United States only one State—Nevada—has adopted the continental formula for a right of reply, and it is reported that this law is working satisfactorily.¹² Only twenty American States have passed statutes, whose

⁶ Law of June 9, 1819. The principal French statutes covering the right of reply are: Law of March 25, 1822; Law of July 29, 1881, and Law of Sept. 29, 1919.

⁷ Andre Perraud, *Le Droit de Réponse* (Paris, 1930); Barbier, *Code Expliqué de la Presse* (2d ed., Paris, 1911), Vol. I; Berraud-Charmantier, *Le Droit de Réponse* (Paris, 1930); Albert Exhenry, *Le Droit de Réponse en matière de presse dans les législations d'Europe* (Thesis, Lausanne, 1929).

⁸ Tribunal correctionnel de la Seine, 12e chambre, Feb. 1, 1929, reported in *Revue Juridique Internationale de Radioélectricité*, 5th year (1929), p. 57; affirmed on appeal in Court of Appeals, Paris, Nov. 27, 1929, *ibid.*, 6th year (1930), p. 36.

⁹ Exhenry, *op. cit.*; Zechariah Chafee, Jr., "Possible New Remedies for Errors in the Press," *Harvard Law Review*, Vol. LX (Nov., 1946), pp. 1 ff.; Richard C. Donnelly, "The Right of Reply: An Alternative to an Action for Libel," *Virginia Law Review*, Vol. 34 (Nov., 1948), pp. 867 ff.

¹⁰ Chafee says of the libel action: "The crude Anglo-Saxon notion of vindicating honor by getting cash has become unsatisfactory to many decent people. They want a less sordid and more convenient procedure, which will focus its attention on what most concerns them, the mistakes in the defendant's statement. It would be desirable for a court to be able to do something tangible to reduce the injurious effect of those mistakes, without having to bother about any of the hard-fought questions of damages which now take up so much time in a libel suit." *Loc. cit.*, p. 7. "A successful libel suit is, at best, almost as unusual as a successful action to break a will. It is the rare exception." Donnelly, *loc. cit.*, p. 874.

¹¹ Chafee, Donnelly and Exhenry, *loc. cit.* Also, Ignace Rothenberg, "The Right of Reply to Libels in the Press," *Journal of Comparative Legislation and International Law*, 3d series, Vol. XXIII, Pt. I (February, 1941), pp. 38 ff.

¹² Donnelly, *loc. cit.*, p. 892. Text in Nevada Comp. Laws (Hillyer, 1929), sec. 10508.

origin can be traced to the English Libel Act of 1843, providing for optional retraction; a newspaper which publishes a full apology or prints a retraction may claim mitigation of damages.¹³

The movement for the establishment of an international right of reply was initiated about twenty years ago, when the problem of international propaganda first became acute. One of the earliest of such proposals was made in 1929, when the International Juridical Congress on Radio adopted a *vœu* favoring the extension to broadcasting of the right of reply already existing, as already mentioned, in certain national legislation.¹⁴ In 1931 the International Federation of League of Nations Societies recommended the establishment of a right of reply on behalf of any state objecting to a report, by press or radio, that was inexact or was calculated to disturb international relations.¹⁵ A similar plan was urged by the International Federation of Journalists at a conference held in Brussels in 1934.¹⁶

The main object of the United Nations plan for an international right of correction is to give states aggrieved by false or distorted reports likely to injure friendly relations an opportunity to secure commensurate publicity for their own publications. It is hoped thereby to prevent the publication of such reports, or at least to attenuate their effects.¹⁷ In order to bring the right into operation, the following conditions must be present: (1) a news dispatch transmitted from one country to another by correspondents or information agencies; (2) its publication abroad; (3) a claim by the demanding state that the dispatch is "capable of injuring its relations with other states or its national prestige or dignity"; and (4) a similar claim that the dispatch is "false and distorted."¹⁸

If these conditions are fulfilled, the complainant state may submit "its own version of the facts" (the *communiqué*) to the contracting states within whose territories such dispatch has been published or disseminated. A copy is also forwarded to the correspondent or information agency concerned, so that the latter *may* (there is no duty to do so) correct the original statement. Within five days the defendant state must release the *communiqué* to the appropriate correspondents and information agencies, and also transmit it to the headquarters of the information agency whose correspondent was responsible for originating the dispatch, if such head-

¹³ Lord Campbell's Libel Act of 1843, 6 and 7 Vict., c. 96, Secs. 1, 2 (1843); American statutes cited and discussed by Chafee, *loc. cit.*, p. 18, Donnelly, *loc. cit.*, p. 892; Arthur and Crosman, *The Law of Newspapers* (2d ed., 1949), pp. 240 ff., and Appendix C, where the statutes are collected.

¹⁴ Lapie, "*Droit de réponse et radiophonie*," *Revue Juridique Internationale de Radioélectricité*, 5th year (1929), p. 16.

¹⁵ League of Nations Doc. C. 602.M.240.1931.IX.Disarmament 1931.IX,19, p. 4.

¹⁶ League of Nations Bulletin of Information on the Work of International Organizations, VII, pp. 50-51.

¹⁷ Convention on the International Transmission of News and the Right of Correction, preamble. *Supra*, note 4.

¹⁸ Article 9.

quarters are within its territory.¹⁹ None of these agencies, however, is under any duty to publish the reply.

In case the defendant state fails to carry out the obligations just described, the complaining state may submit the *communiqué* to the Secretary General of the United Nations, simultaneously notifying the defendant state, which may also submit its comments to the Secretary General. The latter, within 10 days, must "give appropriate publicity through the information channels at his disposal" not only to the reply, but also to the original dispatch and any comments submitted by the defendant state.²⁰

This plan for an international right of correction, if adopted, should make a valuable contribution towards the attainment of higher standards of international news communication. But it offers no panacea. It is noteworthy that, unlike its national counterpart, it is supported by no provisions for judicial control. Furthermore, its operation is almost completely optional; the only sanctions for non-conformance are extremely weak.²¹ In fact, its non-compulsory nature has been lauded by some of its chief proponents as one of its best features,²² although some of the delegates to the United Nations attacked the plan as too cautious and too modest.²³ It does not seem probable that the establishment of such a right could do much to halt campaigns of subversion and hatred inspired by aggressive states and executed by a controlled press and radio. States of this character, in fact, would be the last to adhere to the treaty upon which the right is based. Even if they did ratify the treaty, it would probably be for the very purpose of using the right of correction to answer the legitimate protests of other states against their aggressive policies. In other words, they would use the right simply as one more means of spreading propaganda.²⁴

On the other hand, to the community of free democratic states the right

¹⁹ Article 10.

²⁰ Article 11.

²¹ If a contracting state fails to discharge its obligations with respect to the *communiqué*, the complaining state is permitted to give similar treatment to a *communiqué* later submitted to it by the defaulting state. A weaker sanction could hardly be imagined. True, a failure on the part of the defendant state to *submit* the *communiqué* brings into operation the important provision for action through the Secretary General, but apparently this action is not authorized if the government of the defendant submits the *communiqué* and the news dissemination agencies fail to print it. For by the mere submission the defendant state will have fulfilled its obligations under Art. 10.

²² See speech of Mr. Canham, United States Representative, in the General Assembly May 13, 1949. U. N. Doc. A/P.V.210, May 13, 1949.

²³ Mr. Askoul (Lebanon), found the scheme overcautious, and Mr. Kahali (Syria) called it a "mere mail-box function," with inadequate sanctions for non-performance. U. N. Doc. A/P.V.211, May 13, 1949.

²⁴ Mr. Canham remarked that the Nazi Government before 1939, in answer to reporting of its evil doings by foreign newspapers, would undoubtedly have used its right of correction to flood foreign offices of the democracies with alleged corrections. *Supra*, note 22.

of correction should prove to be of real benefit. It offers a practical means of conciliating the imperative need of states in their mutual relations for reliable, non-subversive, non-incendiary news, with the democratic principle of freedom of information. More than once states have protested against hostile articles appearing in the press of a foreign state, only to be met by the response that the defendant government was powerless to intervene because of constitutional guarantees of freedom of the press.²⁵ With the right of correction in operation, this excuse could no longer be invoked, and both governments concerned, in their own interest, should welcome the chance to invoke this new remedy. Looking to American experience alone, the anti-Spanish campaigns in certain newspapers at the turn of the century, and the anti-British attacks in the same or similar organs between the two world wars, might have been checkmated if, in both cases, the aggrieved state had been able to make an official reply through accepted, highly authoritative channels.

JOHN B. WHITTON

"TREATY-MERCHANT" CLAUSES IN COMMERCIAL TREATIES OF THE UNITED STATES

It is commonplace to say that customary international law imposes no legal duty upon any state to permit aliens to enter and reside in its territory.¹ That there will be, however, in the case of every member of the family of nations, some admission of aliens, may be taken for granted, although in the case of certain totalitarian states the entry of persons, at least those of particular nationalities, may be strictly curtailed. As is well known, numerous bilateral treaties provide, either in specific terms or through the operation of most-favored-nation clauses, for entry that is not given as a matter of obligation under customary law. The treaties make possible a wide variety of arrangements for admission, usually on a basis of mutuality, of natural persons who may acquire thereby a status less definitive than that afforded to full-fledged immigrants but more permanent than that enjoyed by temporary visitors whose visas are valid for a relatively short time.

The United States has provided such a basis for "treaty traders" or "treaty merchants" under Section 3(6) of the Immigration Act of 1924, as amended.² At a time when the United States is leading in an effort for the promotion of international trade and for its facilitation through reasonable freedom of international movement for persons engaging in it, the provisions of this legislation may merit special examination. For

²⁵ British answer to protests from Napoleon, Annual Register, Vol. 45 (1803), p. 665. For response of U. S. Government to protests by Mexico against hostile propaganda in this country, see Hackworth, Digest, Vol. II, p. 142.

¹ See, for example, C. C. Hyde, International Law Chiefly as Interpreted and Applied by the United States (1945 ed.), Vol. I, pp. 216-217.

² 8 U. S. C. (1948), Sec. 203. See wording as reproduced in note 10, *infra*.

students of treaty law and administration the plan involved would seem to have special interest by reason of the manner in which, by express provision, statute and treaties are related. The history of the development, the construction and application of statutory and treaty clauses over a quarter of a century, and possible further or wider uses of the method employed, seem deserving of comment.

When, early in the third decade of the twentieth century, the United States adopted the policy of quantitatively restricting immigration, there arose the question of respecting treaty commitments previously made, and, more particularly, that of providing for special categories of non-immigrants whose admission to the country would not be covered by the basic principle applicable to immigrants. When the matter of a comprehensive immigration statute was before Congress in 1924, draft legislation that was under consideration seemed to the Department of State to be in conflict with treaties already made, and the Secretary of State proposed that exceptions be made for persons admitted under provisions of a treaty.³ In the Senate, a proposed amendment which would have made special provision (by creating a distinct category of non-immigrants) for "an alien entitled to enter the United States under the provisions of a treaty or agreement relating solely to immigration" was defeated by an overwhelming vote,⁴ after the "Gentleman's Agreement," concluded with Japan less than two decades earlier, had been brought into the discussion.⁵ As finally passed by Congress the bill provided non-immigrant status for "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation,"⁶ the suggestion having been made in discussion that in this form the legislation would prevent the continued operation of the "Gentleman's Agreement" and would prevent the making of any later agreement of that kind.⁷

The reference to "present existing treaty" was soon to prove objectionable, particularly from the point of view of making new commercial treaties. In 1929 in a communication to the British Ambassador concerning the entry of Australian business men into the United States, Secretary Kellogg stated that Section 3(6) "would not apply to a treaty concluded subsequently."⁸ It was for the purpose, among others, of permitting benefits to be enjoyed under post-1924 treaties as well as those in effect in

³ 65 Cong. Rec. 5811 (letter from Secretary of State Hughes to Representative Albert Johnson). The letter stated that Sec. 3(2) of the proposed bill, under which non-immigrant status could be given to aliens entering temporarily for business or pleasure, would not meet the treaty requirements.

⁴ *Ibid.*, p. 6315.

⁵ Senator Shortridge said that the so-called understanding of 1907 had failed of its purpose and had ceased to be operative (*Ibid.*, p. 6303).

⁶ H. Rept. No. 350, 68th Cong., 1st Sess., p. 2.

⁷ 65 Cong. Rec. 6304.

⁸ U. S. Foreign Relations, 1927, Vol. I, p. 439.

that year, that the law was amended on July 6, 1932. In the House of Representatives there was a reference to effort that had extended over several years looking to a legislative definition of "merchants."⁹ The new wording of Section 3(6)¹⁰ not only accomplished the purpose of liberalizing the provisions by making them apply to treaties that had been made since 1924 or might be made in the future, but also made it clear that the "trade" referred to was trade between the United States and the country of which the trader was a national,¹¹ and made possible the admission as non-immigrants of the wife of such a trader and his unmarried children under twenty-one years of age.¹² The Senate at first passed—apparently through inadvertence—and then reconsidered and struck out, a House-approved provision whereby treaties were to accord no greater rights of entry than those which had been given before July 1, 1924. The feeling expressed in the Senate was that such a clause would limit the treaty-making powers of the President and the Senate in the future.¹³ It was noted that treaty commitments to which the amended statutory rule would be applicable had (as of the date of the passage of the 1932 amendment) been made to twenty-seven foreign countries.

The actual operation of the "treaty-merchant" clauses has proceeded through administrative regulation and determination as well as judicial interpretation. From the first, the Department of State took the position that Section 3(6) was not intended to open the doors to any aliens entering to engage in business of a purely local character.¹⁴ On the other hand, the word "solely" has been interpreted to mean "principally,"¹⁵ and a

⁹ 75 Cong. Rec. 13841.

¹⁰ "... an alien entitled to enter the United States solely to carry on trade between the United States and the foreign state of which he is a national, under and in pursuance of the provisions of a treaty of commerce and navigation, and his wife and his unmarried children under twenty-one years of age, if accompanying or following to join him."

¹¹ That the Department of State had taken this construction as the proper one even under the earlier wording of the statute is indicated by a communication on the point from the Department of State to the Department of Labor on Jan. 24, 1925 (Hackworth, Digest, Vol. III, pp. 769-770).

¹² There was some debate on the question of excluding from the benefits of the section children adopted since 1924. A proposal to change the language by insertion of the words "including legally adopted children" was defeated in the Senate. 75 Cong. Rec. 13423.

¹³ 75 Cong. Rec. 13841. See also, on the point, House Rept. No. 431, 72nd Cong., 1st Sess.

¹⁴ The Department of State took this position in 1929 (despite the apparently contrary decision of a Federal court, four years earlier, in the case of *Weedin v. Wong Tat Hing et al.*, 6 Fed. (2nd) 201), "in order to keep faith with Congress and to carry out what was evidently the intent of Congress when it passed the Act." Hackworth, Digest, Vol. III, pp. 766-767.

¹⁵ Irving Appleman, "Treaty Trader Status under the Immigration Laws," Department of Justice, Immigration and Naturalization Service, Monthly Review, Vol. VI, No. 1 (July, 1948), pp. 3, 5.

treaty merchant with a Section 3(6) visa has been permitted to engage "incidentally" in other transactions, provided the international ones could be shown to predominate.¹⁶ The limitations of a brief comment preclude more than illustrative indication of the liberal construction given to the statutory provisions. Administrative regulation, for example, has included in the category of those engaged in "trade" within the meaning of Section 3(6) persons serving as foreign correspondents, those operating transportation lines in furtherance of international travel, and those carrying on banking or insurance activities on an international scale.¹⁷ The editor (not proprietor or publisher) of a Japanese newspaper published in San Francisco was held to be engaged in "trade" within the meaning of the statute (in relation to the 1911 commercial treaty with Japan) so that his wife could be admitted as a non-immigrant under Section 3(6).¹⁸ The possession of a particular skill, or competence to exercise discretionary judgment in connection with international trade, may enable an alien applicant to come within the classification, it being necessary to show, in this as in the cases generally, that the trade is presently existing and is substantial in volume.¹⁹ In 1935 the Department of State took the position that a Japanese national was entitled to the benefits of Section 3(6) by reason of his handling cable correspondence that required technical knowledge; in 1941 it decided favorably with respect to clerical employees of a firm engaged in international trade.²⁰

Traders may lose their status and become subject to deportation as a result of their changing to purely local activity, or as a consequence of a treaty's ceasing to be in force. Thus the status of Japanese merchants who had enjoyed privileges in the United States under the Treaty of Commerce and Navigation signed February 21, 1911, was affected by the termination of that treaty.²¹

In its negotiation of general commercial treaties since 1924 the United States has, in conformity with the reservation which the Senate attached to its approval of the Treaty of Friendship, Commerce and Consular Rights with Germany, signed December 8, 1923,²² made it clear that commitments as to entry are not to be construed to affect existing laws relating to immigration or the right to enact laws relating to immigration. However, beginning with the Treaty of Friendship, Commerce and Consular Rights with Poland, signed June 15, 1931,²³ there has commonly been inserted, as an exception to this rule, provisions for the admission of treaty merchants

¹⁶ *Idem*.

¹⁷ 22 C. F. R. 61.140 (d), cited by Appleman, *loc. cit.*, p. 4.

¹⁸ Hackworth, *Digest*, Vol. III, p. 767. ¹⁹ Appleman, *loc. cit.*, pp. 5, 6.

²⁰ Hackworth, *op. cit.*, Vol. III, pp. 771, 772.

²¹ New York Times, March 27, 1948, p. 12. A bill (H. R. 3566) was then before Congress to effect a stay of deportation for some two thousand persons who were reported to have become subject to deportation with the termination of the treaty.

²² 44 Stat. 2132.

²³ 48 Stat. 1507.

on a most-favored-nation basis.²⁴ It may be noted that there is nothing in the express instruction of Congress, or in Section 3(6), which directs that such clauses shall rest on a contingent basis. It is obvious that while the treaty clauses referred to are not of such great interest to traders coming from other Western Hemisphere countries (to which quantitative restrictions upon immigration to the United States do not apply), they hold very substantial advantages for business men from outside this Hemisphere who are nationals of countries having relatively small immigration quotas, and especially for traders from populous Asiatic countries.

Over the twenty-four-year period beginning with 1925 and ending with 1948, more than seventeen thousand non-immigrant aliens were admitted to the United States to carry on trade under treaty provisions, the greatest number in any one year (1,622) being admitted in 1929, and the smallest (49) in the year 1943.²⁵ While there is no statutory limit upon the number of treaty merchants who may be admitted, the status is a regulated one,²⁶ especially in the sense that qualitative tests for admission may be applied. There would, therefore, seem to be no occasion for fear that security regulations might be circumvented under the plan, and no necessity for frequent renewals of the treaty traders' visas, such as are required in the case of temporary visitors admitted under Section 3(2) of the Immigration Act. The method used in Section 3(6) does not mark the first instance of a reference, in national legislation, to commercial treaties.²⁷ If the United States is to move forward with a broad program for technical assistance to undeveloped areas of the world, there might be justification for further experimentation with the general method utilized in the "treaty-merchant" clauses. The going of American business men to foreign countries for relatively long periods of time to build up and develop enterprises within such countries (as distinct from their going to carry on trade between these countries and their own) might conceivably be arranged on the basis of treaties which, in the legal sense, would mark no deviation from the fundamental principle of mutuality.

²⁴ The treaty with Poland refers to nationals of one party "entering, traveling or residing in the territory of the other Party in order to carry on international trade or to engage in any activity related to or connected with the conduct of international trade. . . ." More recent treaties, *e.g.*, that signed with China on Nov. 4, 1946 (Department of State, Treaties and Other International Acts Series, No. 1871, this JOURNAL, Supp., Vol. 43 (1949), p. 27, and that signed with Italy on Feb. 2, 1948 (S. Ex. E, 80th Cong., 2nd Sess.), when referring to nationals of one party entering, traveling and residing in the territories of the other, specifically mention the two countries as those between whose territories the international trade, or "commercial activity related thereto or connected therewith" is to be carried on.

²⁵ For the statistics (with classification by years and by countries), the writer is indebted to the U. S. Bureau of Immigration and Naturalization.

²⁶ For recently promulgated regulations applicable to the subject matter, see Fed. Reg., Vol. 14, No. 184 (Sept. 23, 1949), p. 5805.

²⁷ See this writer's article, "Postwar Commercial Treaties of the United States," in this JOURNAL, Vol. 43 (1949), pp. 262, 264 note.

ROBERT R. WILSON

THE ADOPTION OF FRENCH CHILDREN BY AMERICAN CITIZENS

As a result of social conditions created by the war, the number of adoption proceedings by Americans of foreign children abroad has greatly increased in number. This is especially true in France where adoptions by Americans became frequent after World War I. Adoption constitutes a recognized form of aid to unmarried mothers unable to support a child. It is also helpful in the case of children of impoverished families in which one or both parents have been lost. Where the adopting parents are Americans, the judicial procedure provided under the French Civil Code has usually been observed. An effort has recently been made to avoid complication and expense by following the simpler proceedings provided by American State legislation, the documents being verified before an American diplomatic or consular official. This seems to be regarded by the French courts as a circumvention of the French law and the situation thus produced requires some elucidation in the interest of good relations.

In a recent case¹ an American couple domiciled in California executed papers for adoption of the six-months-old female child of a young unmarried French mother in the presence of the vice consul at the American Embassy in Paris. The mother of the child later executed the necessary authority. When the adopting parents and the mother of the child attempted to register the adoption with the registry of the civil status (*l'état civil*), the Public Minister refused registration. The Civil Tribunal of the Seine sustained the refusal on the ground that the nationality of the infant being French, the judicial proceeding required by the French Civil Code was essential. The court recognized that adoption was in the interest of the infant but that the French judicial proceeding was a fundamental requirement for the adoption of any French child in France.

There seems to have been some effort on the part of the adopting parties to have the court recognize extraterritorial privileges for an adoption executed before an American consular officer at the Embassy. This was rejected because of the absence of any treaty provision and because there was no proof of reciprocity under American law by which the adoption of an American child by French subjects before a French diplomatic or consular officer in the United States would have been recognized.

Under the original provisions of the Napoleonic Civil Code, the right to adopt or to be adopted was one of those purely civil rights reserved to French citizens or to those who had been "homologated" to the rights of French citizens. Under a later amendment, a French citizen may now adopt an alien or be adopted by an alien.² The distinguished French jurist, Pillet,³ was of the opinion that the ordinary rules for the strict ap-

¹ *Recueil Dalloz de Doctrine, de Jurisprudence et de Législation*, 1949, Jurisprudence, p. 368. Civil Tribunal of the Seine, Feb. 10, 1948. Annotation by R. Savatier.

² Civil Code, Art. 345, as amended June 19, 1923, and July 29, 1939.

³ A. Pillet, *Traité Pratique de Droit International Privé* (1923), Vol. 1, p. 652.

plication of the national law of the child should not apply to the adoption of the child of an unmarried mother. Instead, the law of the adopting parent should be recognized, thus permitting a French child to occupy a legitimated family status of which he might otherwise be wholly deprived. The adoption of a French child does not effect the loss of French nationality. Why, then, was the adoption refused in the face of the clear advantage which the court recognized and in the absence of any requirement in the code that French law should apply where the adoption is completed under the law of the country of which the adopting parents are domiciled nationals?

Adoption is an institution which does not prevail in all countries of Western civilization. Indeed it was not recognized under the English common law and therefore only exists in the United States by reason of statute law. Under California law, the consent of both the adopting and the natural parent or parents must be duly proved by an instrument which, if made without the United States, may be proved before a consular officer resident in the country where made. A judge's order is necessary showing "that the interests of the child will be promoted by the adoption."⁴ This is not, however, regarded as a judicial proceeding and the parties are not required to appear before the judge to whom the necessary consents are presented. Accordingly, the requirements of California law seem to have been satisfied in the instant case.

The well-known French jurist, Niboyet, recognizes that in cases like the present, there is no question of depriving the child of any of its political rights. He insists, however, that the child has an inherent right not to have a change of its status by adoption except according to French public law.⁵ One wonders what substantial right is preserved through the application of French law in this case. The attribution of a "right" becomes the deprivation of benefit. Niboyet gives us a more realistic clue to the result reached when he points out that French authorities are unable to carry through an adoption except by the extrinsic and judicial forms of French law. In other words, the judicial forms of one sovereign jurisdiction are not integrated with those of another even where all the substantive requirements have been observed. Unfortunately this is a situation too often met with in international civil and commercial relations.

Perhaps the proponents would have had better success in the instant case if they had presented the record of an adoption which fully complied with the underlying requisites of French law, but which was duly completed under the law of California and certified by the usual *certificat de coutume*, as having validity in California.

⁴ California Civil Code, §§ 226-227, 1182-1183.

⁵ J. P. Niboyet, *Traité de Droit International Privé Français*, Vol. V (1948), No. 1529, pp. 493-496.

Adoption is one of the recognized methods of child aid with parental approval under circumstances similar to those of the instant case. If it is to be continued in times of stress along with closer social and economic relations between the friendly nations of the Western World, some integration in the international rules would seem to be desirable.

ARTHUR K. KUHN

CURRENT NOTES

ANNUAL MEETING OF THE SOCIETY

The Forty-Fourth Annual Meeting of the American Society of International Law will be held in Washington at the Carlton Hotel on Thursday, Friday and Saturday, April 27-29, 1950. To provide more time for general discussion, the meeting will open on Thursday afternoon, instead of on Thursday evening, as heretofore. The annual dinner will close the meeting on Saturday evening. The Committee on Annual Meeting will endeavor to arrange an interesting program for Saturday afternoon.

EDWARD DUMBAULD,
Secretary

AWARD OF CERTIFICATE FOR MERITORIOUS WORK IN INTERNATIONAL LAW

Rules Approved by the Executive Council January 14, 1950

1. There shall be appointed in May of each year by the President of the American Society of International Law a Committee on Awards of the American Society of International Law, comprised of three members, regardless of nationality, to serve for one year or until their successors shall have been appointed. One of the three members shall be designated as Chairman.

2. The Committee on Awards shall be responsible for recommending to the Executive Council of the Society not later than March 15 of each year the name of an author (or names if it be a collective authorship) of a work (in the form of a book, monograph, or article) in the field of International Law, which the Committee on Awards feels deserves the award of the Certificate of Merit of the American Society of International Law.

3. The competition for the award is open to all regardless of nationality or the language or place of publication of the work.

4. Works to be considered for the award must have been published within a twenty-four-month period preceding February 1 of the year in which the award is to be made.

5. The author or his publisher shall forward to the Secretary of the Society, for the Committee's use, at 700 Jackson Place, N. W., Washington 6, D. C., before February 1 of each year not less than three copies of a work which the author or publisher wishes considered for the award.

6. The Committee on Awards shall not limit its consideration to works filed with the Secretary of the Society in accordance with the provisions of section 5, hereof, but may take notice of any other works which shall have been published during the twenty-four-month period preceding February 1 of the year in which the award is to be made.

7. A majority vote of the Committee on Awards is sufficient to support recommendation of a work to the Executive Council of the Society. The Secretary of the Society shall forward the Committee's recommendation to the members of the Executive Council. Should there be a dissenting opinion from the Committee on Awards, the Secretary of the Society, when forwarding the Committee's recommendation, shall set forth the principal arguments of the majority and minority opinions of the Committee on Awards. A majority vote of the Executive Council at a meeting of the Council shall be decisive as to its recommendation to the Society.

8. In the event that no two members of the Committee on Awards can agree on a work published during the period concerned as being sufficiently outstanding to merit the award of the Society, the Committee on Awards may consider any work in the field of International Law published during a thirty-six-month period preceding February 1 of the year in which the award is to be made. In the event that no work published within such a period meets the standards of the Committee on Awards, the Chairman shall so report to the Executive Council of the Society, and no award shall be made at the Annual Meeting of the Society for the year concerned.

9. The award, if any there be, shall be conferred by the President of the Society in the name of the Society after the approval of the recommendation of the Executive Council by the Society at the annual meeting.

REPORT OF SPECIAL COMMITTEE ON UNITED NATIONS PRACTICE

At the last annual meeting of the Society the appointment of a special committee was authorized to study and report upon the attitude and action of the United Nations in cases where one or more Member States have suggested or moved that challenges of competence under the Charter be submitted to the International Court of Justice. The special committee submitted its report to the Executive Council at a meeting held in Washington January 14th. The report was not received in time to be printed in full in the January *Journal*. The conclusions of two members of the committee, the other member dissenting as to paragraphs 3, 6, 7 and 8, are as follows:

1. That challenges to the competence of the United Nations should not be made except when the challenging State can present a substantial *prima facie* case, and that the organs of the United Nations need not consider any protests which are either frivolous or dilatory, without a solid legal foundation.

2. That, when an organ of the United Nations considers that a *prima facie* case of incompetence has been presented in respect to action pending before it, it shall give precedence in its discussion to the issue of competence.

3. That, in the determination of a *prima facie* case by an organ of the United Nations, the relevant opinions of the International Court of Justice shall be taken into account, and that cases closely analogous

to those already dealt with by the Court need not be referred back to the Court but may be solved in accordance with the spirit of the pertinent judicial opinions.

4. That, if an organ disagrees with the Member State or States concerned on the question of its competence to deal with the matter at issue, it shall consider the advisability of referring the question to the International Court of Justice for an advisory opinion.

5. That the organ of the United Nations dealing with the matter at issue may make a reference to the Court conditional on a declaration by the State, or States, challenging its competence that it, or they, will accept the opinion of the Court as decisive with respect to that particular case.

6. That the organ concerned may either decide itself the question of competence, or refer it to a special committee of jurists appointed by it, if the challenging State refuses to make a declaration accepting in advance the opinion of the Court.

7. That a reference to the Court or to a committee of jurists shall not limit the power of any organ of the United Nations to take such action as it may deem necessary to prevent an aggravation of the situation or to maintain or restore international peace and security.

8. That the Government of the United States in its activities in the United Nations should be guided by the principles stated above, and that this Government should endeavor to have these principles approved by the General Assembly and by the Councils of the Organization.

The report was referred by the Executive Council to the committee on the next annual meeting of the Society.

THE ORGANIZATIONAL FRAMEWORK OF THE NORTH ATLANTIC TREATY

In the October, 1949, issue of this JOURNAL (Vol. 43, p. 633) the present writers discussed in some detail the North Atlantic Treaty and the major issues which flowed from its consideration by the Senate. It is the purpose of this note to bring that discussion up to date by outlining the organizational framework which has been created since then to implement the Treaty.

It will be recalled that Article 9 of the Treaty provides in very general terms for the establishment of a council and a defense committee which shall recommend measures for the implementation of Articles 3 and 5.¹

¹ Art. 9 reads as follows: "The Parties hereby establish a council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty. The council shall be so organized as to be able to meet promptly at any time. The council shall set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defense committee which shall recommend measures for the implementation of Articles 3 and 5." For text of treaty, see this JOURNAL, Supp., Vol. 43 (1949), p. 159.

As the report of the Senate Committee on Foreign Relations dealing with the North Atlantic Treaty points out, the specific machinery necessary for this task was to be evolved in the light of need and experience. The Committee further urged that the organization set up "be as simple as possible consistent with its function of assisting implementation of the Treaty and that maximum use be made of existing organizations." No new machinery was envisaged by the Committee or the State Department for the implementation of Articles 1 and 2 which deal with the peaceful settlement of disputes and the development of friendly relations among the twelve signatories. Presumably any such activities outside the realms of security and self-defense were to be carried on within the framework of existing organizations.

Following the ratification of the Treaty the Congress encouraged the North Atlantic states to speedy action through its consideration and passage of the Mutual Defense Assistance Program.² Of the \$1,000,000,000 program authorized under the bill only \$100,000,000 was to be immediately available for military aid to the recipient countries; the remaining \$900,000,000 was to be available only after recommendations for the integrated defense of the North Atlantic area had been worked out and had been approved by the President. Clearly before such plans could be developed planning machinery had to be created. By December 1, 1949, in addition to the Council and the Defense Committee, the following organs had either been established or provided for: (1) a Military Committee, which will recommend to the Defense Committee specific military measures for the unified defense of the North Atlantic Area; (2) a Standing Group, which will function as a sort of coördinating committee for the Military Committee; (3) five regional planning groups for Northern Europe, Western Europe, Southern Europe and the Western Mediterranean, the North Atlantic Ocean, and Canada and the United States; (4) a Defense Financial and Economic Committee, which will study the financial and economic aspects of defense plans; and (5) a Military Production and Supply Board, which will make certain that the military production and procurement program effectively supports defense plans.³

The Council

The principal body in the North Atlantic Treaty organization is the Council. Normally it will be composed of the Foreign Ministers of the member states, although their places may be taken by plenipotentiary representatives designated by the parties. Likewise, the diplomatic rep-

² See Mutual Defense Assistance Act, 1949 (Pub. Law 329, 81st Cong. [H.R. 5895]), Supplement to this JOURNAL, p. 29.

³ See Department of State Press Releases of Sept. 17, 1949 (this JOURNAL, Supp., p. 22), and Nov. 18, 1949, relating to these agencies and their terms of reference (Dept. of State Bulletin, Vol. XXI, No. 534, p. 469; No. 543, p. 819).

representative of each country in Washington is empowered to act for his government whenever necessary. The chairmanship of the Council will rotate annually, according to the alphabetical order in English, beginning with the United States. Ordinary sessions will be held annually and at such other times as may be considered desirable. Extraordinary sessions under Articles 4 and 5 of the Treaty may be called at the request of any party. It is probable that the Council will not meet often but that coördination at the top political level will take place, for the most part, through informal consultation between representatives of the parties in Washington.

The Treaty itself constitutes the Council's term of reference. In accordance with the language of Article 9 it is charged with the broad responsibility of considering all matters concerning the implementation of the various provisions of the Treaty, including the establishment of subsidiary bodies. Since the Council has authority only to *consider* matters concerning the implementation of the Treaty, it follows that its powers are purely advisory in character. Its essential purpose is to make recommendations to the governments and thus to assist them in reaching coördinated decisions. The responsibility for making final decisions, however, lies with the respective governments rather than with the Council itself.

One of the most interesting aspects of the Atlantic Pact organization is the fact that in neither the Pact itself nor in any of the communiqués issued thus far is there any formal provision for voting. While informal arrangements for taking decisions will no doubt be worked out in practice, presumably action will be taken when a project is approved by those states directly concerned. Thus, to take a hypothetical example, Norway and Denmark could take steps to standardize their military equipment without an affirmative vote of the entire group. Similarly, Iceland would not be called upon to approve specific plans relating to the defense of Portugal. There would seem to be considerable advantage in this kind of flexibility where no fixed number of votes is required and where states not directly concerned will be unable to prevent action by their veto.

The Defense Committee

The Defense Committee, which is the only body other than the Council to be mentioned specifically in the Treaty, operates in a subsidiary capacity to the Council. It is composed of one representative from each party who is normally the Minister of Defense. The Defense Committee is convened by the chairman, meeting annually in ordinary session and at such other times as may be requested by the Council or as a majority of the members may deem desirable. The place of each session is to be determined by the chairman in consultation with the members. Like the Council, the chairmanship begins with the United States and will rotate annually.

The prime function of the Defense Committee is to recommend measures

for the implementation of Articles 3 and 5 in accordance with the over-all policy guidance furnished by the Council. At its first meeting in September the Council recommended that the Defense Committee should immediately take the steps necessary to have drawn up unified defense plans for the North Atlantic area. Since that time the Defense Committee has met twice and, according to its communiqué of December 1, 1949,⁴ has arrived at unanimous agreement on the following: (a) strategic concepts for the integrated defense of the North Atlantic area; and (b) principles of an integrated program for the production and supply of armaments and equipment. It also reviewed the problem of the coordination of planning between the various regional groups and the progress of defense planning of the North Atlantic Treaty organization.

The Military Committee

While the Council and the Defense Committee will be concerned with top policy matters, their deliberations will obviously require a great deal of preparatory work, much of it of a technical nature. In the military field the Military Committee, the Standing Group and the five regional planning groups will perform this function. The principal advisory body is the Military Committee composed of one military representative from each party. The high level at which this group will function may be determined from the fact that thus far the representatives, for the most part, have been the chiefs of staff of their respective countries. They will normally meet in Washington.

The main functions of the Military Committee are to recommend to the Defense Committee military measures for unified defense, provide general policy guidance to the Standing Group, and to advise the Defense Committee and other agencies on military matters. Since their first meeting on October 6, 1949, the Military Committee and its Standing Group have directed their attention to the preparation of a strategic concept for the integrated defense of the North Atlantic area in accordance with the principles of self-help and mutual aid.

The Standing Group

One of the most important working parts of the Treaty machinery is the Standing Group consisting of representatives of the United States, the United Kingdom and France. These countries are presumably the ones which would have to bear the brunt of any major defensive action in the North Atlantic area, and which would most frequently be called upon to contribute to the defense of areas other than those for which they have primary responsibility. The permanent seat of the Standing Group is Washington and it is to be organized so as to function continuously.

⁴ Department of State Bulletin, Vol. XXI, No. 546 (Dec. 19, 1949), p. 948.

The principal duties of the Standing Group, which is in effect the subcommittee of the Military Committee, may be outlined as follows: (1) to guide the regional planning groups in the formulation of plans according to the policies laid down by the Military Committee; (2) to coördinate and integrate the defense plans prepared by the regional planning groups; and (3) to recommend matters on which the Standing Group should be authorized to act in the name of the Military Committee. It is clear that this is the body which has the main responsibility for the shaping of over-all defense plans. It serves as the coöordinating link between the regional planning groups and the Military Committee.

In the interests of efficiency and speed the Standing Group has been deliberately limited in size. Three important safeguards, however, have been agreed upon to protect the interests of non-member states. In the first place, countries not represented on the Standing Group may appoint a special representative to serve as permanent liaison with it. In the second place, before the Standing Group makes recommendations on any plan involving the use of forces, facilities, or resources of a state not a member of the group, that state has the right to participate in the formulation of such recommendations. Finally, the regional planning groups, in presenting their plans to the Standing Group, are entitled to have them explained by their own representative and not necessarily by a member of the Standing Group.

The Regional Planning Groups

The Regional Planning Groups are set up on a geographical basis. The Northern European Regional Planning Group consists of Denmark, Norway, and the United Kingdom. The Western European Group is composed of Belgium, France, Luxembourg, The Netherlands, and the United Kingdom. Canada, the United States, Denmark, and Italy will agree to participate in the planning of this group as may be appropriate. The Southern European-Western Mediterranean Group is made up of France, Italy, and the United Kingdom. The Canada-United States Group embodies the United States and Canada. The North Atlantic Ocean Group is the largest and includes Belgium, Canada, France, Iceland, The Netherlands, Norway, Portugal, the United Kingdom, and the United States.

It will be noted that the United States is formally a party to only two of the planning groups. Because of the prominent part we will play in supplying arms and equipment, and because of our rôle in the defense of the North Atlantic area, it was strongly argued that we should be a member of all five groups. Our Government wisely declined such a rôle on the ground that the countries in a particular area must inevitably bear the prime responsibility for its defense. Even so, extensive coöperation on the part of the United States will no doubt be forthcoming; the communiqué of September 17, 1949,⁵ notes, in connection with the membership of each

⁵ Department of State Bulletin, Vol. XXI, No. 534 (Sept. 26, 1949), p. 469.

of the three European planning groups, that "The United States has been requested and has agreed to participate actively in the defense planning as appropriate."

The rôle of the planning groups is a basic one; they will develop and recommend through the Standing Group to the Military Committee plans for the defense of their particular regions. This will necessitate close coöperation among the various planning groups in order to avoid conflict in plans and to ensure a coördinated defense effort. Coördination is further assured in that each state party to the Treaty has the right to participate in any planning group when recommendations are being considered which affect the defense of its territory or involve the use of its forces, facilities, or resources. Moreover, any group may call on a party not a member of that group to participate whenever it may be able to contribute to the planning of that group.

Committees Dealing with Economic Problems

Obviously, integrated defense plans for the North Atlantic area involve far more than purely military considerations; they call for a continual study of the broad financial and economic aspects of defense as well as the highly important problems of military production and supply. To perform these functions two additional committees have been established: the Defense Financial and Economic Committee, subordinate to the Council, and the Military Production and Supply Board, subordinate to the Defense Committee.

The Defense Financial and Economic Committee is composed of representatives at a ministerial level from each member country. While it will meet at such times and places as may be required, its working staff will be located in London. The Committee has a general responsibility to provide the various agencies of the North Atlantic defense hierarchy with guidance on the financial and economic aspects of defense programs. In particular it is responsible to the Council for the performance of five important functions: (1) to develop financial and economic guides to defense programs which member states should undertake within their available resources; (2) to appraise the impact which these programs will have on the economies of the participating countries; (3) to recommend financial arrangements for defense programs with particular reference to the possible interchange of military materials and equipment; (4) to recommend steps to meet the foreign exchange costs of essential imports from other countries; and (5) to consider plans for economic and financial mobilization in time of emergency.

In discharging its responsibility the Defense Financial and Economic Committee is enjoined to keep in mind the principle of self-help and mutual aid in the field of military production and supply, as well as the

primary importance of economic recovery and stability. These two concepts are, of course, fundamental if the re-armament efforts of the North Atlantic states are to proceed in a balanced fashion without unduly impairing the economic health of the area. As the Defense Committee pointed out in its communiqué of December 1, 1949: "The objective is adequate military strength accompanied by economy of resources and manpower."

The Military Production and Supply Board is made up of representatives at the sub-ministerial level from the member countries. Like the Financial and Economic Committee it may meet at such times and places as may be required, although its secretariat and working staff are located in London. Like the Financial and Economic Committee, too, it may delegate any of its functions to regional boards or committees if they can be performed more satisfactorily in that fashion.

The Board will work closely with the various military bodies of the Atlantic Pact hierarchy to make certain that military production and procurement programs tie in effectively with defense plans. It will review the military supply situation and will recommend to the Defense Committee ways and means of increasing available supplies where they fall short of requirements. Further it will promote more efficient methods of producing military equipment. This latter function will include not only the tremendously important task of standardizing military equipment, but also that of extending technical advice on the production of new or improved weapons. The Board, with constant regard for the principle of self-help and mutual aid, ought to be able to encourage a considerable amount of teamwork in a very vital aspect of collective defense.

Concluding Comment

Thus, by December 1st, 1949, a good beginning had been made by the member states both in setting up the complex structure of the North Atlantic Pact and in formulating the over-all objectives necessary to carry out the defense provisions of the Pact. But even though a real advance has been made over anything that existed before, the *Christian Science Monitor* recently pointed out that "the arrangement so far looks more like a loose-jointed cobweb than like the kind of tight-knit functioning common defense operation which would puncture any aggressor's dreams of capturing Europe." The road to an integrated defense of the North Atlantic area is a rocky one full of chuckholes and detours. We will still need a great deal of coöperative planning and coöperative action before we can expect to reach the end of that road.

THORSTEN V. KALLJARVI AND FRANCIS O. WILCOX
Senate Foreign Relations Committee

NATION v. STATE; JUDGMENT FOR NATION

"State" is the name traditionally used by lawyers for the political organism that is author of law and, as a legal person, also subject to law. Yet as a term of international law "state" is so unsatisfactory that, it is submitted, we should replace it by "nation."

Let us not be troubled by etymology. Though "nation" once meant *birth*, it has long since lost this primary meaning (as fully as "state" has lost it). Nor does it even have much left of its first derivative meaning of *people*¹ (whether actually of common birth or figuratively so because speaking one language or having some other bond). The preamble of the United Nations Charter, referring to such groups of human beings, speaks not of the nations but of the "*peoples of the United Nations*." In this phrase and generally today, "nation" means one of those entities in the list beginning with Afghanistan and ending with Yugoslavia, which lawyers often call states and laymen, countries.

In the United States certainly, "nation" commonly means a political organism just as specific as "state," the Nation being our central political organism and the State some one of the 48 constituent political organisms that give the United States its name. What once was usually called the Union is now oftener styled the Nation. Regulation of economic life, we say, in recent years has passed largely from the States to the Nation. We have the flag of our Nation or our country and the flag of our State; we have State highways and national highways; we have State taxes and national taxes.

However, it is not because in the United States (and Australia) the term "state" has come to have this special sense that I urge the disuse of the term on the world scene. Already the term "international state" has considerable currency to distinguish the State of the world from the State of the Union, and, though cumbersome, it would do if we can't dispense with "state" in that sense.

But the word "state" is an unsatisfactory tool. It has widely diverse meanings, and so may confuse. Thus "the State of the Union" as used above is not "the state of the Union" concerning which the President of the United States speaks to the Congress. Also "state" in the sense of highest level political organism is inflexible. It offers few derivatives. A person owing allegiance to a state cannot be described as a "stater" or a "stateman" (and "statesman" has quite other meaning); we have no adjective from "state" in the political sense, stately or static relating as they do to "state" in two quite other senses. And "state" when itself used as an adjective always refers to States of the Union and never to world-level states. Even statism and statist have no currency as *étatisme* and *étatiste* have in French. Perhaps these words in English recall un-

¹ As in the "nations" of students at medieval (and some modern) universities.

pleasantly their drab (but compelling) cousin, statistics! The only derivatives of "state" in the sense of international state are "stateless" and "statehood."

On the other hand, "nation" is a good tool word. Suffixes and prefixes fit it. It is versatile in an area where new needs are constantly arising.

But the chief argument for "nation" is that in its international law sense it is already accepted. There is no virtue in clinging to an ambiguous term of art when an equally or more precise and flexible term is in common modern use. "Country" and "nation" are "state"'s everyday synonyms;² but "country" having two familiar meanings (and in its adjective sense only the meaning "rural"), "nation" is clearly the better choice. We speak of the family of nations, never the family of states. When the core of this family attained legal personality it was as the League of Nations, not the league of states, and now in the organizations of the United Nations.

To refer to the international state, the adjective already invariably used is "national." And the persons who compose it are nationals. Strong feeling for it is called nationalism. "Nationality," "nationalize," and "nationalization" are all familiar and accurate derivatives related to "nation" in the sense of international state. Moreover, we have never described the law governing these political organisms without using the word "nation": it is never interstate law or the law of states, always international law or the law of nations, thus neatly contrasting to the national law, that is, the law of each nation.

Closely related is the term for conferring nationality—"to naturalize"—and its compounds. And "extranational," "contranational," and "supranational" can be brought into use as needed. Still more words are easily coined from nation—"nationary"; "nationable"; "nationdom" for statehood; "nationless" for stateless; "innational" for a man without a country.

But we need not cross these bridges until we come to them. The bridge we should cross now is that which carries us away from the rigid "state" of the archaic *ius strictum* to the apt "nation" of the modern *ius gentium*. The *droit des gens* is not the *droit des états*; it is the *droit international*. World law is not the law of states; it is the law of *nations*.

WILLIAM GORHAM RICE
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² One does not casually realize how generally these words have crept into legal use. For example, the Provisional Agreement of 1946 between the United States and the Republic of the Philippines, Dept. of State, T. I. A. S. 1539, 60 Stat. 1800, never uses the word "state." In the preamble it speaks of "peoples." Then the United States recognizes the Republic "as a separate self-governing nation." Finally the "parties" agree to negotiate treaties "regulating relations between the two countries." The General Relations Treaty of 1946 between them, T. I. A. S. 1568, 61 Stat. 1174, likewise uses both "nation" and "country," never "state."

INTERNATIONAL POLITICAL SCIENCE ASSOCIATION

The Statute of an International Association of Political Science was approved following a conference at UNESCO House, Paris, from September 12 to 16, 1949, of 23 political science experts and specialists representing 17 nations. Professor Raymond Aron (France) was Chairman of the conference, Professors W. A. Robson (United Kingdom) and Quincy Wright (U.S.A.), Vice Chairmen, and John Goormaghtigh (Belgium), Secretary.

The Statute approved by the conference provides for an International Association of Political Science, having as its object the promotion of the development of political science all over the world. A provisional executive committee of 12 members was appointed by the conference. The Chairman of this committee is Professor Quincy Wright (U.S.A.) and the Vice Chairmen are Professors Brogan (United Kingdom) and Bridel (Switzerland). The provisional headquarters of the Association will be in Paris, and the function of executive secretary will be exercised temporarily by Professor François Goguel.

The work program of the Association envisages the publication of an international review, the creation of national political science associations, establishment of contacts between specialists of various countries by means of international conferences, as well as circulation of information by the organization through a reference and documentation service on political science. After the publication by UNESCO of the results of the world inquiry on the status of political science, the association hopes to publish an analytical study of various methods practiced, with some general conclusions on the subject.

THE INTERNATIONAL ACADEMY OF POLITICAL SCIENCE AND
CONSTITUTIONAL HISTORY (AT THE SORBONNE)

The International Academy of Political Science and Constitutional History met for the first time since 1938 at the Sorbonne, under the chairmanship of Mr. Julliot de la Morandière, Dean of the Faculty of Law of Paris, and in the presence of Mr. J. Sarrailh, Rector of the University of Paris. The Academy, which was founded at the Sorbonne in 1936 as the International Institute of Political and Constitutional History, appointed the following new Board of Directors (Directing Council) for 1949-1951:

President: Dean Julliot de la Morandière; *Vice-Presidents:* G. Bourgin, René Cassin, P. Coste-Floret, B. Mirkin-Guetzévitch, P. Renouvin, Ph. Sagnac, J. Sarrailh, André Siegfried (France); C. Brinton, J. P. Chamberlain (United States); R. Levene (Argentina); V. E. Orlando (Italy); E. Santos (Colombia); R. Altamira (Spain); A. Alvarez (Chile); F. Van Kalken (Belgium); E. C. S. Wade (Great Britain).

Members of the Council: J. J. Chevallier, F. Ponteil, M. Prélôt, H. Puget, M. Walline (France); J. Augusto (Brazil); L. Boissier (Switzerland); R. M. MacIver, J. U. Nef, F. A. Ogg, P. B. Potter (United States); V. V. Pella (Rumania); Z. Peska (Czechoslovakia); F.

Dehousse, G. Smets (Belgium); Sir B. N. Rau (India). *Treasurer*: J. Laferrière. *General Secretary*: H. de Montfort.

Administrative Commission: President: L. Julliot de la Morandière; *Executive Vice President*: B. Mirkine-Guetzévitch; *General Secretary*: H. de Montfort.

The meeting of the Academy lasted two days and was dedicated to the study of "The Concept of the Political Party."

The Academy decided to resume publication of its monographs as well as of its *Review of Political and Constitutional History*. The next session of the Academy will be held in Paris in 1950 and will deal with the study of parliamentary government in the 19th and 20th centuries.

INTERNATIONAL CONGRESS OF PRIVATE LAW

The Directing Council of the International Institute for the Unification of Private Law has announced plans for holding an International Congress of Private Law in Rome during July, 1950, to consider certain projects of private law which have undergone important changes and which are of real interest at the present time, and to call the attention of jurists to the work of unification of private law, its results, prospects and methods to be followed in the future. Among the subjects to be studied at the Congress are: the task of jurists in the development of legislative provisions; the enjoyment and exercise of civil rights in relation to nationality; the binding force of contracts and its modifications in modern legislation; the influence of canon law upon the law of contracts; restrictions upon freedom to contract in the regulation of the employer-employee relationship; the concept of trusts and its applications in various legal systems; completion of the international uniform law on bills of exchange and promissory notes approved by the Geneva Convention of 1930, with particular reference to the English Bills of Exchange Act and the Negotiable Instruments Law of the United States; a uniform international law on liability of carriers with regard to various means of transport; the prospects, limits and methods of unification of private law and coördination of the work of various international organizations concerned with private law studies.

All jurists who are interested in private law problems and in the unification of private law are invited to participate in the Congress. Universities, national organizations, institutions and academies of law, as well as international organizations interested in the subject, are also invited to be represented.

Pending the establishment of National Committees for the Congress, all acceptances and entries will be received by the Secretariat of the Congress at the seat of the International Institute for the Unification of Private Law, 28 Via Panisperna, Rome. All reports, communications and notes on questions on the program should reach the Secretariat of the Conference before April 1, 1950. The official program and regulations of the Conference will be announced later.

LEGATUM VISSERIANUM

The Board of Curators of Leiden University has announced an international prize contest in which awards will be made for the best papers written on each of the following subjects, which have been designated in agreement with the Faculty of Law:

1. A critical study of the international civil law and jurisdiction of the 20th century concerning confiscation (including nationalization of property).
2. A critical survey of the organization and procedure of the great international political conferences from the middle of the 17th century to the end of the 19th century (Westphalia, Nimeguen, Ryswick, Utrecht, Vienna, Paris (1856), Berlin (1878)), with emphasis on the technique of the conferences rather than on their political aspects.

Papers should be typewritten in English, French, German, South African or Dutch and should be sent to the Board of Curators of Leiden University before November 1, 1950. Manuscripts should bear a motto, which should also appear on a sealed envelope attached to the manuscripts and containing the name and address of the author or authors. Prizes will be awarded to a maximum of 5,000 Dutch guilders for each prize subject to those papers which, in the opinion of the Board of Curators and the Faculty of Law of Leiden University, merit an award.

This award has been made possible through the bequest of the late S. J. Visser, who left his fortune to Leiden University on condition that the income therefrom should be used to promote the study of international public and private law, and made a special stipulation that periodically a sum of at least 5,000 Dutch guilders should be devoted to an international prize contest. Mr. Visser's legacy has been named the *Legatum Visserianum* and is administered by the Board of Curators of the University.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD AUGUST 1-OCTOBER 31, 1949

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *C.I.E.D.*, Chronology of International Events and Documents, Royal Institute of International Affairs; *Cmd.*, Great Britain Parliamentary Papers by Command; *D.S.B.*, Department of State Bulletin; *D.S.P.R.*, Department of State Press Release; *F.A.O.*, Food & Agriculture Organization; *G.A.(IV)O.R.*, U.N. General Assembly Official Records, 4th Session; *G.B.M.S.*, Great Britain Miscellaneous Series; *G.B.T.S.*, Great Britain Treaty Series; *I.B.R.D.*, International Bank for Reconstruction and Development; *I.C.J.*, International Court of Justice; *I.I.S.*, India Information Services [Press Release]; *I.M.F.*, International Monetary Fund; *I.R.O.*, International Refugee Organization; *I.T.U.*, International Telecommunications Union; *L.T.*, London Times; *N.Y.T.*, New York Times; *P.A.U.*, Pan American Union; *T.C.O.R.*, U.N. Trusteeship Council Official Records; *T.I.A.R.*, U.N. Treaties and International Agreements Registered; *T.I.A.S.*, U. S. Treaties and Other International Acts Series; *U.N.B.*, United Nations Bulletin; *U.N.E.S.C.O.*, United Nations Educational, Scientific and Cultural Organization; *U.N.P.R.*, United Nations Press Release; *U.P.U.*, Universal Postal Union; *W.H.O.*, World Health Organization.

GENERAL*

February, 1949

- 28 GREAT BRITAIN—NORWAY—SWEDEN. Signed agreement at Oslo relating to a joint ocean weather station in north Atlantic. Text: *G.B.T.S.* No. 29 (1949), *Cmd.* 7688.

March, 1949

- 3 NETHERLANDS—NEW ZEALAND. Exchanged notes at Wellington concerning visas. Text: New Zealand *Treaty Ser.* 1949, No. 6.
- 14 ARGENTINA—GREAT BRITAIN. Exchanged notes at Buenos Aires on double taxation. Text: *G.B.T.S.* No. 37 (1949), *Cmd.* 7721.
- 14 NEW ZEALAND—UNITED STATES. Exchanged notes at Wellington regarding visa fees. Text: New Zealand *Treaty Ser.* 1949, No. 5; *T.I.A.S.* 1940.
- 21 GREAT BRITAIN—GREECE. Exchanged notes at Athens modifying air services agreement of Nov. 26, 1945. Text: *G.B.T.S.* No. 26 (1949), *Cmd.* 7678.

April, 1949

- 6/17 EGYPT—GREAT BRITAIN. Exchanged notes at Cairo on equality of treatment in regard to war damage compensation. Text: *G.B.T.S.* No. 35 (1949), *Cmd.* 7710.

* See p. 175 below for United Nations and Specialized Agencies; also p. 178 and following for Multipartite Conventions.

May, 1949

- 10 FRANCE—GREAT BRITAIN. Exchanged notes at London on proposed cession of territory in Zeila area to Ethiopia. Text: *G.B.T.S.* No. 47 (1949), *Cmd.* 7758.
- 27-September 30 GREAT BRITAIN—GUATEMALA. U. K. note of Sept. 8 replied to Guatemalan note of May 27 concerning Belize claim. Summary: *L.T.*, Sept. 27, 1949, p. 3. U. K. reaffirmed Sept. 25 position on Guatemalan claim and repeated offer to submit question to I.C.J. *N.Y.T.*, Sept. 26, p. 5; *L.T.*, Sept. 26, p. 3. Summary of Guatemalan statement of Sept. 30: *L.T.*, Oct. 1, p. 3.

June, 1949

- 29 GREAT BRITAIN—GREECE. Exchanged notes at Paris establishing additional drawing rights for Greece under the European Payments Agreement of Oct. 16, 1948. Text: *G.B.T.S.* No. 64 (1949), *Cmd.* 7802.

July, 1949

- 16 PAKISTAN—PHILIPPINE REPUBLIC. Signed air services agreement at Karachi. *T.I.A.B.*, Sept., 1949, p. 8.
- 28 TRADE-MARKS. Far Eastern Commission approved policy decision on restoration and protection of Allied-owned trade-marks in Japan. Text: *D.S.B.*, Aug. 29, 1949, p. 309.

August, 1949

- 1 MEXICO—UNITED STATES. Signed at Mexico City agreement regarding Mexican migrant agricultural workers. *D.S.B.*, Aug. 29, 1949, p. 313.
- 1-October 17 I. B. R. D.—LOANS. Granted loans as follows: Finland (Aug. 1), \$12,500,000; (Oct. 17), \$2,300,000; India (Aug. 18), \$34,000,000; (Sept. 29), \$10,000,000; Colombia (Aug. 19), \$15,000,000; and Yugoslavia (Oct. 17), \$2,700,000. Texts of agreements: IBRD *Loan Numbers* 16FI, 21FI, 17IN, 19IN, 18CO, 20YU.
- 3-September 28 RUSSIA—YUGOSLAVIA. Yugoslav note protested Russian action in abandoning support of Yugoslav territorial claims against Austria at Paris Conference of Foreign Ministers. *N.Y.T.*, Aug. 6, 1949, p. 7. Russian reply of Aug. 11 denied Yugoslav allegations. Text: *New Times*, Aug. 17, Supp. Yugoslav note of Aug. 23 offered to negotiate differences provided Russia did not interfere in Yugoslav internal affairs. *N.Y.T.*, Aug. 24, p. 1. Text: p. 4. Treaty of friendship and alliance, signed April 11, 1945, denounced Sept. 28 by Russia. *N.Y.T.*, Sept. 30, p. 1. Text of note: p. 11; *USSE Information Bulletin*, Oct. 7, p. 595.
- 5 CHINA—UNITED STATES. U. S. Department of State released White Paper on mutual relations. Text: Dept. of State *Far Eastern Ser.* 30. Text of covering letter and Wedemeyer Report: *N.Y.T.*, Aug. 6, 1949, pp. 4-5.
- 6 INDIA—PAKISTAN. At conference on common rivers Pakistan proposed reference of their dispute on water resources to I.C.J. *N.Y.T.*, Aug. 7, 1949, p. 6.
- 6/10 ITALY—YUGOSLAVIA. Signed agreement settling Yugoslav war damage claims and providing for return of 5 Yugoslav naval vessels captured during the war. *N.Y.T.*, Aug. 7, 1949, p. 20; *C.I.E.D.*, Aug. 4/17, p. 546. Announced Yugoslav intent to release Italian fishing boats seized in Adriatic in wartime. *N.Y.T.*, Aug. 11, p. 8.
- 8 IRAN—JORDAN. Announced agreement for a treaty of friendship, commercial and cultural relations. *L.T.*, Aug. 9, 1949, p. 3; *C.I.E.D.*, Aug. 4/17, p. 549; *N.Y.T.*, Aug. 8, p. 3.

August, 1949

- 8-9 COUNCIL OF EUROPE. Committee of Ministers met at Strasbourg. Invited Turkey, Greece and Iceland to participate. Turkey and Greece accepted. *N.Y.T.*, Aug. 9, 1949, p. 1; *C.I.E.D.*, Aug. 4/17, pp. 534-535. Article on procedure: *L.T.*, Aug. 6, p. 5. Adopted agenda for the Assembly. *N.Y.T.*, Aug. 10, pp. 1, 11.
- 8-10 RUHR AUTHORITY. Council met in Düsseldorf. *L.T.*, Aug. 9, 1949, p. 4; Aug. 11, p. 3.
- 8-12 TELECOMMUNICATIONS CONFERENCE. Conference for Revision of Bermuda Telecommunications Agreement of 1945 was held at London. *D.S.B.*, Sept. 5, 1949, p. 336. Short article: *D.S.B.*, Oct. 3, pp. 508-509.
- 10-September 9 COUNCIL OF EUROPE. Assembly held 1st session at Strasbourg. *N.Y.T.*, Aug. 11, 1949, p. 1. Elected M. Spaak (Belgium) President. *N.Y.T.*, Aug. 12, pp. 1, 4. Text of Mr. Churchill's address: *N.Y.T.*, Aug. 13, p. 3. Text of report: *G.B.M.S.* No. 14 (1949), *Cmd.* 7807.
- 11-12 RED CROSS CONFERENCE. In session since April 21, conference approved 4 conventions. *N.Y.T.*, Aug. 12, 1949, p. 4; *L.T.*, Aug. 12, p. 3. 57 states signed Final Act, 15 signed all conventions. U. S. signed 3, excluding that on Protection of Civilians in Wartime. *L.T.*, Aug. 13, p. 3; *C.I.E.D.*, Aug. 4/17, pp. 537-538. Article: *D.S.B.*, Sept. 5, pp. 339-340. French texts of conventions on Protection of Civilian Persons in Time of War; Red Cross (revising those of Aug. 22, 1864, July 6, 1906, and July 27, 1929); Revision of Hague Convention No. X (Geneva Convention in Maritime War) of Oct. 18, 1907; Prisoners of War (revising that of July 27, 1929): *Revue Internationale de la Croix-Rouge*, Aug.-Oct., 1949, pp. 225-292; 299-326; 327-349; 371-451. English texts: *Ibid.*, Supps. English text of resolutions adopted: Sept. Supp., pp. 295-298.
- 13 DENMARK—GREAT BRITAIN. Signed trade agreement at Annecy, France. Text: *Denmark* No. 1 (1949), *Cmd.* 7786.
- 15 SYRIA. Following executions of President Zayim and Premier Berazi, the Coalition Cabinet headed by Hasem Bey Atassi assumed control pending establishment of a constitutional government. *N.Y.T.*, Aug. 16, 1949, pp. 2, 12. Members: *C.I.E.D.*, Aug. 4/17, p. 551.
- 16 GERMAN OCCUPATION (Western Zones). Payments agreement signed with U. K. *L.T.*, Aug. 17, 20, 1949, p. 3. Text: *G.B.T.S.* No. 7 (1949), *Cmd.* 7824.
- 16 GREAT BRITAIN—PAKISTAN. Published agreement of June-July for release of sterling balances and hard currencies to Pakistan. Text: *Cmd.* 7765.
- 17 ALIENS. President Truman issued proclamation, amending Proclamation 2523, regarding control of persons entering or leaving U. S. Text: *D.S.B.*, Aug. 29, 1949, pp. 314-315.
- 18 ALBANIA—ITALY. Albanian Minister arrived in Rome to present credentials, marking renewal of diplomatic relations. *N.Y.T.*, Aug. 19, 1949, p. 3.
- 18/19 CZECHOSLOVAKIA—GREAT BRITAIN. Three-year sterling payments agreement was signed and came into force. *L.T.*, Aug. 19, 1949, p. 3; *N.Y.T.*, Aug. 19, p. 2. Text: *G.B.T.S.* No. 52 (1949), *Cmd.* 7781.
- 19 CUBA—PERU. Diplomatic relations broken off by Peru. *N.Y.T.*, Aug. 20, 1949, p. 4.

August, 1949

- 22 CHINA—UNITED STATES. U. S. note protested siege of U. S. Consulate General at Shanghai, July 29–Aug. 2. Text: *D.S.B.*, Sept. 19, 1949, pp. 440–441.
- 22 WAR CRIMES. U. K. Foreign Office issued statement on execution of sentences passed by British military courts on Italian war criminals. Text: *L.T.*, Aug. 23, 1949, p. 3.
- 25–27 PEACE CONFERENCE. U.S.S.R. Conference for Peace was held in Moscow. *N.Y.T.*, Aug. 26, 1949, p. 6. Decided to set up permanent committee to organize and direct efforts of Soviet citizens against threat of war. Headquarters to be in Moscow. Members: *N.Y.T.*, Aug. 28, p. 33. Speeches, etc.: *New Times*, Aug. 31, Supp., and Sept. 7, Supp.
- 31 ASYLUM. Announcement that Colombia and Peru had agreed on terms for submitting to I.O.J. dispute over Victor Raul Haya de la Torre, head of APRA. *N.Y.T.*, Sept. 1, 1949, p. 11.
- 31 GREECE—ITALY. Signed agreement at Rome providing for economic collaboration and for settlement of differences arising from Italian Peace Treaty. *L.T.*, Sept. 1, 1949, p. 3; *N.Y.T.*, Sept. 1, p. 6.
- 31–September 7 EUROPEAN ECONOMIC COÖPERATION ORGANIZATION. Council agreed on division of Marshall plan aid for 1949/50. *N.Y.T.*, Sept. 1, 1949, p. 1. Table: p. 11; *L.T.*, Sept. 2, p. 4. Session recessed Sept. 3. *N.Y.T.*, Sept. 4, p. 4. Members signed in Paris new intra-European payments agreement. *N.Y.T.*, Sept. 8, p. 6. Text: *G.B.M.S.* No. 13 (1949), *Cmd.* 7812.

September, 1949

- 1 IRAN—UNITED STATES. Signed agreement at Teheran on education exchanges authorized by Fulbright Act, the 12th in the series. *D.S.B.*, Sept. 19, 1949, p. 443.
- 2 KOREAN RECOGNITION. Granted by El Salvador. *N.Y.T.*, Sept. 3, 1949, p. 2. Recognitions to July 28: *U.N.B.*, Sept. 15, p. 311.
- 2 SOUTH AFRICA. Published Citizenship Act whereby all Union nationals immediately become South African citizens. Act makes no provision for common status for Commonwealth citizens. *L.T.*, Sept. 3, 1949, p. 4.
- 6 PAKISTAN—PHILIPPINE REPUBLIC. Established diplomatic relations. *N.Y.T.*, Sept. 8, 1949, p. 14.
- 6 WAR CRIMES. Italian Ambassador in London refused to receive Ethiopian aide-mémoire demanding that Count Graziani and Marshal Badoglio be handed over as war criminals. *L.T.*, Sept. 8, 1949, p. 4.
- 6–13 INTER-PARLIAMENTARY UNION. Held 38th meeting in Stockholm. Conference ended with plea for East-West reconciliation. *N.Y.T.*, Sept. 14, 1949, p. 12. Report: *Inter-parliamentary Bulletin*, Oct., pp. 97–113.
- 7 BELGIUM—GREAT BRITAIN. Signed loan agreement. Text: *Belgium* No. 1, (1949), *Cmd.* 7811.
- 7–12 CANADA—GREAT BRITAIN—UNITED STATES. Held conference in Washington on shortage of dollars in sterling area. Statements by Messrs. Abbott, Cripps and Snyder: *N.Y.T.*, Sept. 8, 1949, p. 3. Text of joint communiqué: *N.Y.T.*, Sept. 13, p. 8; *D.S.B.*, Sept. 26, pp. 473–475; *Cmd.* 7788.
- 7–21 GERMANY (Federal Republic). Parliament opened at Bonn and elected Karl Arnold and Erich Koehler as presidents of Bundesrat and Bundestag. *N.Y.T.*,

September, 1949

- Sept. 8, 1949, pp. 1, 7; *L.T.*, Sept. 8, p. 4. Theodor Heuss was elected and sworn in as President Sept. 12. *N.Y.T.*, Sept. 13, p. 1. Konrad Adenauer elected Chancellor Sept. 14. *N.Y.T.*, Sept. 16, p. 5; *L.T.*, Sept. 16, p. 4. Cabinet took office. List: *N.Y.T.*, Sept. 21, p. 13; *L.T.*, Sept. 21, p. 4. Formally established by proclamation of the Occupation Statute by the Allied High Commission. *D.S.B.*, Oct. 3, pp. 512-513.
- 8-30 POLAND—YUGOSLAVIA. Polish note charged Yugoslav officials with espionage in Poland. Text: *Polish Facts & Figures* (London), Sept. 17, 1949, p. 3. Yugoslav Government spokesman stated Sept. 13 rejection of note and protested Polish action against Mr. Petrovich, a Yugoslav representative, accused of espionage. *L.T.*, Sept. 14, p. 3. On Sept. 30 Poland denounced mutual aid treaty of March 18, 1946. *C.I.E.D.*, Sept. 22/Oct. 5, p. 657; *N.Y.T.*, Oct. 1, p. 1.
- 8/October 5 GOLD. U. S. informed Far Eastern Commission of intention to turn over \$80,000,000 in Japanese gold to Thailand and French Indo-China. *N.Y.T.*, Sept. 9, 1949, p. 12. On Oct. 5 Department of State ordered General MacArthur to do so. Text of directive: *D.S.B.*, Oct. 24, p. 637.
- 9 DENMARK—INDIA. Decided to establish diplomatic relations. *N.Y.T.*, Sept. 10, 1949, p. 8.
- 9 FINLAND—INDIA. Decided to establish diplomatic relations. *N.Y.T.*, Sept. 10, 1949, p. 8.
- 13 BROADCASTING CONFERENCE. North American Regional Broadcasting Conference opened 3d session at Montreal. *D.S.B.*, Oct. 3, 1949, p. 510.
- 13 IRELAND—UNITED STATES. Signed double taxation conventions at Dublin. *N.Y.T.*, Sept. 14, 1949, p. 23; *D.S.B.*, Oct. 3, p. 518.
- 13-16 I. B. R. D. and I. M. F. Fourth annual meetings of the Boards of Governors were held in Washington. *N.Y.T.*, Sept. 14, 1949, pp. 1, 3; *U.N.P.R.*, IB/150. Articles: *U.N.B.*, Oct. 1, pp. 390-399.
- 16-30 CHINA (Blockade). Department of State informed Isbrandtsen Co. (N. Y.) Sept. 16 that U. S. Government would not convoy merchant shipping into Chinese ports. Chinese Nationalist warships detained 3 ships of company Sept. 29. On Sept. 30 U. S. turned down request from owners for naval aid in freeing ships. *N.Y.T.*, Sept. 30, pp. 1, 5; Oct. 1, p. 4. Text of Department's telegrams of Sept. 16 and 30: *D.S.B.*, Oct. 10, p. 557.
- 17 INDIA. Constituent Assembly passed bill to abolish jurisdiction of British Privy Council to hear appeals from Indian High Courts. After Oct. 10 Federal Court of India has jurisdiction in all appeals except those assigned for next session of Privy Council. *I.J.S.* No. 3911/DC, pp. 8-9.
- 17 NORTH ATLANTIC COUNCIL. Met in Washington and set up framework of North Atlantic Treaty organization, which includes Council, Defense and Military Committees and regional planning groups. *N.Y.T.*, Sept. 18, 1949, p. 1. Text of communiqué: pp. 3-4; *D.S.B.*, Sept. 26, pp. 469-472.
- 18 CYRENAICA. Became an independent state. *N.Y.T.*, Sept. 19, 1949, p. 9.
- 18-21 CURRENCY DEVALUATION. U. K. devalued pound sterling from \$4.03 to \$2.80. Sterling area countries took similar step. *N.Y.T.*, Sept. 19, 1949, p. 1. Text of Sir Stafford Cripps' statement: *L.T.*, Sept. 19, p. 4. Supplemental list of countries: *N.Y.T.*, Sept. 22, p. 8.

September, 1949

- 19 CUBA—ITALY. Signed at Havana joint declaration of friendship and collaboration. *N.Y.T.*, Sept. 20, 1949, p. 3.
- 19—October 4 U.N.E.S.C.O. Held 4th general conference at Paris with representatives from 47 states. Elected E. R. Walker (Australia) President. *N.Y.T.*, Sept. 20, 1949, p. 3. Chose Florence, Italy, for next conference and approved application of Ceylon for membership. *U.N.P.R.* UNESCO/146. Conference ended with adoption of budget of \$8,000,000. *N.Y.T.*, Oct. 5, p. 7.
- 20 GREAT BRITAIN—NETHERLANDS. Signed agreement in London for settlement of conflicting claims to German enemy assets. Text: *Netherlands* No. 1 (1949), *Cmd.* 7803.
- 20 NORTH ATLANTIC TREATY. Russian notes to U. S., Italy, U. K. and France protested Italian participation in pact. *N.Y.T.*, Sept. 22, 1949, p. 2. Text of note to Italy: *USSE Information Bulletin*, Oct. 7, p. 614.
- 20 PEACE TREATIES. United States forwarded to U.N. its correspondence with Bulgaria, Hungary and Rumania from April 2—Sept. 19, 1949, on observance of human rights and fundamental freedoms. Text: *U.N.Doc.* A/985 and Corr. 1.
- 20/21 SYRIAN RECOGNITION. Granted by U. S., U. K., France, Egypt, Lebanon and Saudi Arabia. *D.S.B.*, Oct. 3, 1949, p. 515; *N.Y.T.*, Sept. 21, p. 5; Sept. 22, p. 5.
- 21 ALLIED HIGH COMMISSION (Germany). Council of Commission came into being and declared in force Occupation Statute approved at Washington, April 8, 1949. *N.Y.T.*, Sept. 22, 1949, pp. 1, 10; *L.T.*, Sept. 22, p. 4. Texts of declaration, Law No. 1, and Occupation Statute: *Journal Officiel* of the Commission, Sept. 23, pp. 2-15.
- 21 GERMAN OCCUPATION (Western Zones). Military Government replaced by Allied High Commission for Germany. Occupation Statute of April 8, 1949, declared in force. *N.Y.T.*, Sept. 22, 1949, pp. 1, 10; *D.S.B.*, Oct. 3, p. 513.
- 25 PAKISTAN—PORTUGAL. Announced decision to exchange diplomatic missions. *N.Y.T.*, Sept. 26, 1949, p. 10.
- 26—October 31 EXPULSION OF DIPLOMATS. Hungary expelled 10 Yugoslav officials and Yugoslavia 9 Hungarian officials. *N.Y.T.*, Sept. 27, 1949, pp. 1, 5; Sept. 28, p. 1. U. K. demanded Sept. 30 recall of Hungarian diplomat in London and Poland expelled 8 Yugoslav diplomats. *N.Y.T.*, Oct. 1, pp. 1, 6. Hungary retaliated Oct. 6. *C.I.F.D.*, Oct. 6/19, p. 685. Czech Government asked recall of Yugoslav Ambassador Oct. 4. *N.Y.T.*, Oct. 5, p. 8. 5 members of Czechoslovak Embassy and 8 of Polish Embassy were ordered to leave Yugoslavia. *L.T.*, Oct. 7, p. 4. On Oct. 31 U. S. demanded recall of 2 Czechoslovak officials, following similar action against 2 U. S. attachés in Prague. *N.Y.T.*, Nov. 1, p. 1.
- 27 BURMA—UNITED STATES. Signed air transport agreement at Rangoon. *D.S.B.*, Oct. 10, 1949, pp. 557-558. Text: *D.S.P.R.*, Sept. 27, 1949, No. 740.
- 27/October 18 RUSSIA—UNITED STATES. Russian Ambassador signed memorandum of agreement at Washington for return of 80 lend-lease ships to U. S. by Dec. 1, some of which were turned over at Bremerhaven (Germany) and Yokosuka (Japan) on Oct. 14 and 18. *D.S.B.*, Oct. 10, 1949, p. 558; *N.Y.T.*, Sept. 28, p. 5; Oct. 15, p. 8; Oct. 19, p. 25.

September, 1949

- 28/October 18 CZECHOSLOVAKIA—GREAT BRITAIN. Signed 5-year trade and financial agreement. Text: *G.B.T.S.* No. 62 (1949), *Cmd.* 7799. Ratified by Czechoslovakia. *N.Y.T.*, Oct. 19, 1949, p. 19. Signed agreement on compensation for British property rights and interests, affected by Czech measures of nationalization, expropriation and dispossession. Text: *G.B.T.S.* No. 60 (1949), *Cmd.* 7797. Signed agreement on settlement of inter-governmental debts. Text: *G.B.T.S.* No. 61 (1949), *Cmd.* 7798.
- 30 GERMAN OCCUPATION (Berlin Blockade). U. S. Air Force ended airlift, in operation since June 26, 1948. *N.Y.T.*, Oct. 1, 1949, p. 7.
- 30 HUNGARY—YUGOSLAVIA. Hungarian note denounced mutual aid treaty of Dec. 8, 1947. *N.Y.T.*, Oct. 1, 1949, p. 1. Text: p. 6.
- 30 PROPERTY. U. S. High Commissioner for Germany announced each of the 4 Länder had promulgated legislation supplementing restitution legislation previously enacted by U. S. Military Government. Text of release: *D.S.B.*, Oct. 17, 1949, pp. 591-592.

October, 1949

- 1 CHINA (Communist). New government proclaimed with Chou En-lai as Foreign Minister. *N.Y.T.*, Oct. 2, 1949, p. 1. Text: Oct. 3, p. 2.
- 1/3 BULGARIA—YUGOSLAVIA. Bulgaria denounced 1947 treaties of friendship and frontier control. *C.I.E.D.*, Sept. 22/Oct. 4, 1949, pp. 642-643.
- 1-23 GERMANY (Federal Republic). Russian notes to U. S., U. K., and France stated Western Powers had violated Potsdam agreement by establishing Bonn government. *N.Y.T.*, Oct. 3, 1949, p. 1. Text: p. 4; *USSR Information Bulletin*, Oct. 21, p. 622. Poland sent similar notes. *N.Y.T.*, Oct. 6, p. 11. Text: *Polish Facts & Figures* (London) Oct. 15, pp. 1-2. Text of statement by Acting Secretary of State Webb: *D.S.B.*, Oct. 17, pp. 590-591. Czechoslovakia, Hungary, and Rumania presented notes or made declarations in reply to which Secretary Acheson issued statement. Text: *D.S.B.*, Oct. 24, p. 634. U. S. rejected Russian charges on Oct. 17. Text: *D.S.B.*, Oct. 31, p. 670. Excerpts from U. K. rejection of Hungarian protest: *L.T.*, Oct. 26, p. 3.
- 2 CHINA—RUSSIA. Russia broke off relations with Nationalist Government. *N.Y.T.*, Oct. 3, 1949, p. 1. Text: p. 2.
- 2 RUMANIA—YUGOSLAVIA. Rumania announced denunciation of treaty of friendship, signed Dec. 19, 1947. *C.I.E.D.*, Sept. 22/Oct. 5, 1949, p. 657; *N.Y.T.*, Oct. 2, p. 1.
- 2-5 CHINESE (Communist) RECOGNITION. Granted by Russia, Oct. 2; Bulgaria and Rumania, Oct. 3; Poland, Hungary and Czechoslovakia, Oct. 4; Yugoslavia and Korea (Soviet), Oct. 5. *N.Y.T.*, Oct. 2, 1949, pp. 1, 2; Oct. 4, p. 6; Oct. 5, p. 17; Oct. 6, p. 6. Text of Russian notice: *USSR Information Bulletin*, Oct. 21, p. 625.
- 3-11 SEA EXPLORATION. International Council for Exploration of the Sea met at Edinburgh with representatives from 12 European countries, and observers from U. S., Canada and F.A.O. *L.T.*, Oct. 4, 1949, p. 4; *D.S.B.*, Nov. 7, p. 699. Decided to publish monthly chart showing locations of shoals, quality of fish and landing ports available. *L.T.*, Oct. 5, p. 4.
- 4 CZECHOSLOVAKIA—YUGOSLAVIA. Czechoslovak note denounced treaty of friendship and mutual assistance. *C.I.E.D.*, Sept. 22/Oct. 5, 1949, p. 646.

October, 1949

- 5 CHINA—CZECHOSLOVAKIA. Chinese Nationalist Government severed diplomatic relations. *L.T.*, Oct. 6, 1949, p. 4.
- 5 NORTH ATLANTIC DEFENSE COMMITTEE. Met in Washington. Ordered Military Committee to work out unified defense plans. *N.Y.T.*, Oct. 6, 1949, p. 1. Committee members: p. 6; *L.T.*, Oct. 6, p. 4.
- 5-15 BENELUX. Initialed agreement at The Hague for a provisional economic union, retroactive to Oct. 1. *N.Y.T.*, Oct. 6, 1949, p. 10; *L.T.*, Oct. 6, p. 4. Conference, held Oct. 13-15, closed with announcement that economic union would become effective July 1, 1950, provided Marshall plan aid continues until 1952. *L.T.*, Oct. 17, p. 3. Major points of agreement approved at conference: *N.Y.T.*, Oct. 16, p. 22.
- 6 GERMAN OCCUPATION (Soviet Zone). U. S. protested treatment of American nationals in eastern Germany and accused Russia of creating an oppressive police state there. *L.T.*, Oct. 7, 1949, p. 4; *N.Y.T.*, Oct. 7, pp. 1, 4. Text of note: p. 4; *D.S.B.*, Oct. 17, p. 592.
- 6 MILITARY ASSISTANCE PROGRAM. Mutual Defense Assistance Act of 1949 was signed by President Truman. *N.Y.T.*, Oct. 7, 1949, p. 1. Text of Act: *D.S.B.*, Oct. 24, p. 603; *Public Law* 329, 81st Cong.
- 7 PROPERTY. U. S. sent memorandum to Benelux, U. K., France accepting Report with recommendations of Inter-Governmental Group for Safeguarding of Foreign Interests in Germany. Text of Memorandum and Report: *D.S.B.*, Oct. 17, 1949, pp. 574-584.
- 7-13 GERMANY (Democratic Republic). Soviet-sponsored People's Council transformed itself into a People's Chamber (*Volkskammer*) and declared in force the constitution drafted last May. New state to be known as the German Democratic Republic. Named Otto Grotewohl as Minister-President, or Chancellor. People's Chamber will be provisional government until elections scheduled for Oct. 15, 1950. Adopted 20-point manifesto. *L.T.*, Oct. 8, 1949, p. 4; *N.Y.T.*, Oct. 8, p. 1. Summary of manifesto: p. 4. French officials stated Oct. 8 new régime had no legal basis. *N.Y.T.*, Oct. 9, p. 3. Parliament, meeting for first time on Oct. 11, elected Wilhelm Pieck as President. *N.Y.T.*, Oct. 12, p. 1. Cabinet members: p. 3; Oct. 13, p. 18. Soviet Commander-in-Chief in Germany announced Russia had transferred to People's Chamber administrative functions formerly handled by Soviet Military Administration which will now become a Control Commission. *N.Y.T.*, Oct. 11, p. 1. Allied High Commission stated the government has no legal basis. Summary: p. 3; *L.T.*, Oct. 11, p. 4. Text: U. S. High Commissioner for Germany *Information Bulletin*, Nov., p. 45. Secretary of State Acheson declared Republic has no legal validity. Text: *D.S.B.*, Oct. 24, pp. 634-635. Text of Prime Minister Stalin's statement: *N.Y.T.*, Oct. 14, p. 8; *USSR Information Bulletin*, Oct. 21, p. 621.
- 8 CHINA—MONGOLIA. Mongolian People's Republic severed diplomatic relations with Nationalist government. *N.Y.T.*, Oct. 8, 1949, p. 5.
- 13-18 GERMAN (Democratic Republic) RECOGNITION. Granted as follows: Russia, Oct. 13; Bulgaria, Oct. 17; Hungary, Czechoslovakia, Poland, Oct. 18. *N.Y.T.*, Oct. 14, 1949, p. 1; Oct. 18, p. 14; Oct. 19, p. 20; *C.I.E.D.*, Oct. 6/19, pp. 674, 685. Text of Prime Minister Stalin's statement: *N.Y.T.*, Oct. 14, p. 8; *USSR Information Bulletin*, Oct. 21, p. 621.

October, 1949

- 13–November 3 NOBEL PRIZES. Peace prize awarded to Lord John Boyd Orr. Awards in medicine made to Dr. Walter B. Hess (Switzerland) and Dr. Antonio C. Egas Moniz (Portugal), and in chemistry and physics to William F. Gianque (U. S.) and Hideki Yukawa (Japan), respectively. *N.Y.T.*, Oct. 13, 1949, p. 1; Oct. 28, p. 1; Nov. 4, p. 1.
- 14–15 MIXED COURTS OF EGYPT. Mixed and Consular Courts in Egypt closed in accordance with provisions of Montreux Convention of 1937. Jurisdiction will be assumed by Egyptian national courts. *L.T.*, Oct. 14, 1949, p. 3. Transfer took place the 15th. *L.T.*, Oct. 17, p. 3.
- 16 GERMANY (Democratic Republic)—RUSSIA. Appointed chiefs of missions in Moscow and Berlin. *N.Y.T.*, Oct. 17, 1949, p. 1.
- 17 COLOMBIA—UNITED STATES. Exchanged notes terminating as of Dec. 1, 1949, Reciprocal Trade Agreement of Sept. 13, 1935. Treaty of Dec. 12, 1846, will govern commercial relations. *N.Y.T.*, Oct. 18, 1949, p. 12. Text: *D.S.B.*, Nov. 7, pp. 711–712.
- 17 GREECE—RUSSIA. Announcement made of deportation over protests of Greek Government, of 17,000 Greek nationals from Soviet Georgian Republic to southern Kazakhstan. *D.S.B.*, Oct. 31, 1949, p. 670; *L.T.*, Oct. 13, p. 3.
- 27 RED CROSS—POLAND. International Committee of the Red Cross was ousted by Poland. *N.Y.T.*, Oct. 28, 1949, p. 1.
- 30 ARAB LEAGUE. Ended two-week meeting at Cairo. Appointed permanent committee for Palestine affairs and a committee to draft a collective security pact. *N.Y.T.*, Oct. 31, 1949, p. 9. Article: *L.T.*, Oct. 28, p. 5.
- 31 NORTH ATLANTIC TREATY ORGANIZATION. Defense Ministers of the Northern European Group (U. K., Norway and Denmark) met in London. Text of official statement: *L.T.*, Nov. 1, 1949, p. 8.

UNITED NATIONS AND SPECIALIZED AGENCIES

July, 1948

- 1–June 30, 1949 SECRETARY GENERAL. Text of report to General Assembly for the period: *G.A.(IV)O.B.*, Supp. No. 1.

April, 1949

- 29/August 9 U. N.—GUARD. Special Committee on United Nations Guard was established. Member nations: *D.S.B.*, Aug. 29, 1949, p. 289. Approved report to General Assembly by vote of 9–0–8. *U.N.B.*, Sept. 1, p. 286. Text: *G.A.(IV)O.B.*, Supp. No. 13.

July, 1949

- 26/August 3 U. N.—UNITED STATES. U.N. protested publication of Senate Sub-committee charging Communist terrorism in U.N. Secretariat. Text: *N.Y.T.*, July 28, 1949, p. 8. Secretary Acheson's reply affirmed U. S. confidence in administration of Secretariat. Text: *N.Y.T.* Aug. 4, p. 5; *D.S.B.*, Aug. 22, pp. 252–253.

August, 1949

- 1 CONVENTIONAL ARMAMENTS COMMISSION. Adopted French proposal for arms census. *N.Y.T.*, Aug. 2, 1949, p. 3; *D.S.B.*, Aug. 8, p. 181. Text: *U.N.Doc.* S/C.3/SC.3/21 and Add. 1.

August, 1949

- 1/4 **INDONESIAN COMMISSION.** Indonesian Republic and Netherlands signed 3d cease-fire agreement at Batavia. *N.Y.T.*, Aug. 1, 1949, p. 10. Agreement in effect in Java and Sumatra, Aug. 10 and 14, respectively. *N.Y.T.*, Aug. 4, p. 12. Submitted 1st interim report to Security Council. Text: *U.N.Doc. S/1373*.
- 1-17 **GENERAL ASSEMBLY, INTERIM COMMITTEE.** Met at Lake Success. Decided to ask Assembly to continue Committee indefinitely. *N.Y.T.*, Aug. 11, 1949, p. 8. Adopted report. Text: *U.N.Doc. A/966*; *G.A.(IV)O.R.*, Supp. No. 11.
- 1-October 22 **PALESTINE CONCILIATION COMMISSION.** Opened talks at Lausanne with Israeli representatives on repatriation of Arab refugees. *U.N.B.*, Aug. 15, 1949, p. 157. Note of Aug. 29 from 4 Arab states demanded return of area won by Israeli army. *C.I.E.D.*, Aug. 18/Sept. 7, pp. 570-571. Talks adjourned Sept. 15 and re-opened in New York Oct. 22. *U.N.P.R. PAL/536*.
- 8-11 **SECURITY COUNCIL (Palestine Question).** Russia proposed that U.N. withdraw staff from Palestine, liquidate Palestine Commission and let Israel and Arab states work out settlement. Mediator opposed this. *N.Y.T.*, Aug. 9, 1949, p. 7. Voted to end Near East arms embargo and to abolish post of Palestine Mediator. *N.Y.T.*, Aug. 12, pp. 1, 4. Text of resolution: *U.N.Doc. S/1376*; *D.S.B.*, Aug. 29, pp. 286-287; *U.N.B.*, Sept. 1, p. 226. Declared truce superseded by armistice agreements: p. 222.
- 8-September 20 **KASHMIR COMMISSION.** Announced India and Pakistan accepted in principle a joint meeting for implementing truce agreement. *U.N.P.R. KASH/72*. Text of correspondence between Commission and the governments: *U.N.P.R. KASH/76*. Adopted Aug. 13 resolution, part II of which included truce agreement. Text of latter: *U.N.P.R. KASH/77*, pp. 2-3. Text of Secretary Acheson's statement of Aug. 31: *D.S.B.*, Sept. 12, 1949, p. 399. Text of Secretary General's letter to Commission on arbitration: *U.N.P.R. KASH/80*. Reported to Security Council inability to resolve dispute. Stated Pakistan had agreed to accept arbitration with Admiral Nimitz as arbitrator, but India refused arbitration. *N.Y.T.*, Sept. 21, p. 2. Text of statement: *U.N.P.R. KASH/79*.
- 10-27 **TRADE AND TARIFFS CONFERENCE.** Contracting Parties to General Agreement on Tariffs and Trade continued 3d session. 5 technical protocols were opened for signature. *U.N.P.R. ITO/175*; *N.Y.T.*, Aug. 14, 1949, p. 12. Cuban delegation announced its withdrawal from conference Aug. 10. *N.Y.T.*, Aug. 11, p. 9. Conference closed Aug. 27. Summary *D.S.P.R.*, Oct. 7, No. 774. Docs. relating to Conference: *Cmd. 7790, 7791, and 7792*. Countries completing tariff negotiations: *U.N.P.R. ITO/179/Section B*.
- 23-September 19 **ROAD AND MOTOR TRANSPORT CONFERENCE.** Held at Geneva with representatives from 33 countries. Elected J. J. Oyevaar (Netherlands) President. *L.T.*, Aug. 24, 1949, p. 3. Prepared and opened for signature Convention on Road Traffic, Protocol of Accession of Occupied Areas to Convention, and Protocol on Road Signs and Signals. Texts: *U.N.Docs. E/CONF. 8/47, 49 and 50*. Text of Final Act: *U.N.Doc. E/CONF.8/48*.
- 28-November 2 **INDONESIA CONFERENCE.** Round-table conference of Dutch and Indonesian delegates was held at The Hague to discuss transfer of sovereignty. Signed Statute of Union and other agreements. Text of Statute: *N.Y.T.*, Nov. 3, 1949, p. 4. Text of Special Report to Security Council on conference: *U.N.Docs. S/1417 and Add.1*.

August, 1949

- 25-September 12 NON-SELF-GOVERNING TERRITORIES. Special Committee on Information held meeting at Lake Success. Provisional agenda: U.N.Doc. A/AC.28/1. Recommended to General Assembly establishment of similar committee for 3-year term. *N.Y.T.*, Sept. 13, 1949, p. 17. Report: U.N.Doc. A/923 and Corr.

September, 1949

- 7-October 18 U. N.—VETOES. 31st to 41st vetoes cast by Russia on Sept. 7, 13, Oct. 11 and 18 on membership for Nepal, Portugal, Jordan, Italy, Finland, Ireland, Austria, Ceylon; on approval of report from Commission on Conventional Armaments; and on projected census of conventional armaments and information on atomic weapons. *N.Y.T.*, Sept. 8, 1949, p. 10; Sept. 14, p. 12; Oct. 12, p. 1; Oct. 19, p. 16; *U.N.B.*, Oct. 1, pp. 413-414.

- 13-October 8 JERUSALEM. Palestine Conciliation Commission proposed a 2-zone international rule with a U.N. Commissioner as supreme authority. *N.Y.T.*, Sept. 14, 1949, pp. 1, 14. Summary of plan: *L.T.*, Sept. 14, p. 4. Text: U.N.Doc. A/973. Israel stated opposition to plan Sept. 26. *N.Y.T.*, Sept. 27, p. 14. King of Jordan also disapproved. *N.Y.T.*, Oct. 9, p. 32.

- 20-October 22 GENERAL ASSEMBLY. Opened 4th session at Flushing Meadow. Elected Carlos P. Romulo (Philippines) President. *N.Y.T.*, Sept. 21, 1949, pp. 1, 6. Provisional agenda: *D.S.B.*, Aug. 29, pp. 287-289; U.N.Docs. A/932 and 964. Annotated agenda: *U.N.P.R.* GA/508. China charged Russia with threatening Chinese independence and territory, and peace of the Orient, and asked question be placed on agenda. *N.Y.T.*, Sept. 28, pp. 1, 3. Text: U.N.Doc. A/1000. On Oct. 20 elected Ecuador, India and Yugoslavia to Security Council for 1950. *N.Y.T.*, Oct. 21, pp. 1, 3. Elected Mexico, Iran, U. S., Pakistan, Canada and Czechoslovakia to Economic and Social Council. Elected Iraq and Argentina to Trusteeship Council and chose Dominican Republic to fill vacancy thereon due to Costa Rica's resignation. Lowered slightly U. S. share of assessment. p. 3. Scale of assessments: U.N.Doc. A/1034. Extended life of Korean Commission on Oct. 21. *N.Y.T.*, Oct. 22, p. 6. Text of resolution: U.N.Doc. A/1089. Adopted resolution asking I.C.J. for advisory opinion on legal question relating to procedure provided in Peace Treaties for settlement of disputes (human rights in Bulgaria, Hungary and Rumania), and to retain on agenda of 5th session question of observance in countries mentioned. *N.Y.T.*, Oct. 23, pp. 1, 14. Text of resolution: U.N.Doc. A/1043.

- 26 I. T. U. Announcement made of Ceylon's and Israel's membership. *U.N.P.R.* SA/47.
- 27 TRUSTEESHIP COUNCIL. Held 1st special session to name member of Visiting Mission to Trust Territories in West Africa. Antonio Ramos Pedrueza to succeed Abelardo Ponce Sotelo. Text of report: *T.C.O.B.*, 1st special sess.
- 29 FISHERIES COUNCIL (Mediterranean). Announcement made that representatives of France, Greece, Italy, Lebanon, Turkey, U. K. and Yugoslavia, at conference in Rome under auspices of F.A.O., reached agreement on establishment of a Mediterranean Fisheries Council. *U.N.P.R.* FAO/390.
- 29 I. C. J. U. K. deposited application for hearing on Anglo-Norwegian fisheries dispute. *U. N. P. R.* ICJ/161.

October, 1949

- 10 I. M. F.—YUGOSLAVIA. The Fund provided an exchange transaction whereby Yugoslavia received \$3,000,000 in U. S. currency. *N.Y.T.*, Oct. 11, 1949, p. 13.

October, 1949

- 10 U. N.—UNITED STATES. President Truman signed bill permitting loan to U.N. of U. S. military men and equipment for non-combat duty. *N.Y.T.*, Oct. 11, 1949, p. 11.
- 11-20 I. R. O. General Council held 4th meeting at Geneva. Elected Maj. Gen. F. G. Galleghan (Australia) chairman. *U.N.P.R.* IRO/185. Voted to recommend extension of work 6 to 9 months past official closing date [June 30, 1950]. *C.I.E.D.*, Oct. 6/19, 1949, p. 692. Text of memorandum to General Assembly: *U.N.Doc.* A/C.3/528. Article: *U.N.B.*, Nov. 21, pp. 784-785.
- 13 I. C. J. France submitted application for hearing in dispute on protection of French nationals in Egypt. *U.N.P.R.* ICJ/64.
- 20-29 ECONOMIC COMMISSION FOR ASIA AND THE FAR EAST. Held 5th session at Singapore. Countries represented: *U.N.P.R.* EC/756. Provisional agenda: *U.N.Doc.* E/CN.11/194. Accepted for associate membership Viet Nam and Korean Republic, on Oct. 21 and 22. *N.Y.T.*, Oct. 22, 1949, p. 7; Oct. 23, p. 13. Article: *U.N.B.*, Dec. 1, pp. 676-679.
- 22 U. N.—PRAYER. General Assembly voted, 45-0-7, to open and close each session with a minute of silence for prayer and meditation. *N.Y.T.*, Oct. 23, 1949, p. 16.
- 22 U. N.—U. P. U. General Assembly approved supplementary agreement of July 13/27, 1949, regarding use of U.N. *laissez-passer*. Text of resolution: *U.N.Doc.* A/1044.
- 24 U. N. Cornerstone of Secretariat Building in New York was laid. Texts of President Truman's and Mr. Lie's addresses: *N.Y.T.*, Oct. 25, 1949, p. 7; *U.N.B.*, Nov. 1, pp. 497-499.

MULTIPARTITE CONVENTIONS

- AMERICAN STATES, ORGANIZATION OF. Charter. Bogotá, April 30, 1948. Ratification: Dominican Republic. March 7, 1949. Dominican Republic, Secretario de Estado, *Boletín*, Jan./March, 1949, p. 75.
- CIVIL RIGHTS FOR WOMEN. Bogotá, March 2, 1948. Ratification: Dominican Republic. March 7, 1949. Dominican Republic, Secretario de Estado, *Boletín*, Jan./March, 1949, p. 81.
- DANUBE RIVER. Belgrade, August 18, 1948. Ratifications deposited: Bulgaria, Feb. 22, 1949; Czechoslovakia, Feb. 23, 1949; Hungary, March 14, 1949; Rumania, March 5, 1949; Russia, May 11, 1949; Ukraine, May 14, 1949; Yugoslavia, Feb. 23, 1949. *T.I.A.E.*, Aug., 1949, p. 8.
- ECONOMIC STATISTICS. Protocol of Amendment. Paris, Dec. 9, 1948. Acceptances deposited: Denmark, Sept. 27, 1949, *T.I.A.E.*, Sept., 1949, p. 50; Finland, Aug. 17, 1949, *T.I.A.E.*, Aug., 1949, p. 30.
- EXHIBITIONS. Paris, Nov. 22, 1928. Protocol of Amendment. Paris, May 10, 1948. Signatures: France, Sweden, Switzerland, Morocco, Italy, Belgium, Portugal, Denmark, Norway, Finland, Lebanon, Haiti. Text: *G.B.M.S.* No. 12 (1949), *Cmd.* 7736.
- GENOCIDE. Paris, Dec. 11, 1948. Signatures: Colombia, Aug. 12, 1949, *U.N.P.R.* L/94; Denmark, Sept. 28, 1949, *N.Y.T.*, Sept. 29, 1949, p. 14; Israel, Aug. 17, 1949, *U.N.P.R.* L/96. Ratification deposited: Iceland, Aug. 30, 1949, *U.N.P.R.* L/97.

HAGUE CONVENTION No. X (Geneva Convention in Maritime War), Oct. 18, 1907. Revision. Geneva, August 12, 1949. Text (English): *Revue Internationale de la Croix-Rouge*, Sept., 1949, Supp., pp. 327-349.

INDUSTRIAL PROPERTY RIGHTS. Neuchâtel, Feb. 4, 1947.

Ratification deposited: Great Britain. May 23, 1947.

Text: G.B.T.S. No. 54 (1949), *Cmd.* 7784.

INTER-AMERICAN RADIO AGREEMENT. Washington, July 9, 1949.

Signatures: Argentina,* Bolivia, Brazil,* Canada, Chile, Colombia, Costa Rica, Cuba,* Dominican Republic, El Salvador, Ecuador, United States, Guatemala, Honduras, Mexico,* Nicaragua, Panama, Uruguay, Venezuela.

Text (English): P.A.U. *Congress and Conference Ser.* No. 58, pp. 6-23.

INTRA-EUROPEAN PAYMENTS. Amendment. Paris, Sept. 7, 1949.

Signatures: Austria, Belgium, Denmark, France, Greece, Ireland, Iceland, Italy, Luxembourg, Norway, Netherlands, Portugal, U. K., Sweden, Switzerland, Turkey, French Zone of Occupation of Germany, UK/US Zones of Occupation of Germany, UK/US Zones of Free Territory of Trieste.

Text: G.B.M.S. No. 13 (1949), *Cmd.* 7812.

LETTERS, ETC. OF DECLARED VALUE. Paris, July 5, 1947. Signatures, Text and list of ratifications: G.B.T. No. 58 (1949), *Cmd.* 7795.

LOCUST CONTROL. London, Feb. 22, 1949.

Signatures: Belgium, U. K., South Africa, Southern Rhodesia.

Text: G.B.T.S. No. 53 (1949), *Cmd.* 7783.

MOST-FAVORED-NATION TREATMENT (Germany). Geneva, Sept. 14, 1948. Signatures:

China, Jan. 18, 1949, *U.N.T.S.*, Vol. 24, p. 320; Syria, Sept. 24, 1949, *U.N.P.R.* L/99.

NARCOTIC DRUGS. Lake Success, Dec. 11, 1946. Accessions deposited: Ethiopia, Dec. 28, 1948, *T.I.A.R.*, Sept., 1949, p. 50; Luxembourg, Oct. 13, 1949, *T.I.A.R.*, Oct., 1949, p. 18.

NORTH ATLANTIC TREATY. Washington, April 4, 1949.

Ratifications deposited: France, Portugal, Italy and Denmark, Aug. 24, 1949, *N.Y.T.*, Aug. 25, 1949, p. 3; *L.T.*, Aug. 25, p. 4; Iceland, Aug. 1, 1949, *C.I.E.D.*, July 21/Aug. 3, p. 514.

In force Aug. 24, 1949. *D.S.B.*, Sept. 5, p. 355.

OBSCENE PUBLICATIONS. Paris, May 4, 1910. Protocol of Amendment. Lake Success, May 4, 1949.

Signature: Ceylon. July 14, 1949. *T.I.A.R.*, July, 1949, p. 22.

Ratifications deposited: Egypt,* Sept. 16, 1949; Switzerland, Sept. 23, 1949, *T.I.A.R.*, Sept., 1949, p. 52; Finland, Oct. 31, 1949, *T.I.A.R.*, Oct., 1949, p. 22.

POLITICAL RIGHTS FOR WOMEN. Bogotá, May 2, 1948. Ratification: Dominican Republic. March 7, 1949. Dominican Republic, Secretario de Estado, *Boletín*, Jan./March, 1949, pp. 75-76.

PRISONERS OF WAR. Revision. Geneva, Aug. 12, 1949. Text (English): *Revue Internationale de la Croix-Rouge*, Oct., 1949, Supp., pp. 371-448.

PRIVILEGES AND IMMUNITIES, UNITED NATIONS. London, Feb. 13, 1946. Acceptances deposited: Costa Rica, Oct. 26, 1949, *T.I.A.R.*, Oct., 1949, p. 20; Iraq, Sept. 15, 1949, *U.N.Doc.* A/940/Add. 1; Israel, Sept. 21, 1949, *N.Y.T.*, Sept. 22, p. 2.

* With reservation.

PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR. Geneva, August 12, 1949. Text (English): *Revue Internationale de la Croix-Rouge*, Aug., 1949, Supp., pp. 228-292.

PUBLIC HEALTH OFFICE. Protocol. New York, July 22, 1946. Ratification deposited: Guatemala. Aug. 26, 1949. *T.I.A.E.*, Aug., 1949, p. 34.

RED CROSS. Geneva, August 12, 1949. [Replaces conventions of Aug. 22, 1864, July 6, 1906, and July 27, 1929.]

Text (English): *Revue Internationale de la Croix-Rouge*, Sept., 1949, Supp., pp. 299-326.

ROAD TRAFFIC. Geneva, Sept. 19, 1949.

Signatures: Austria, Belgium, Denmark,* Dominican Republic,* Egypt, France,* India,* Israel, Italy, Lebanon,* Luxembourg, Netherlands, Norway,* Philippine Republic,* South Africa,* Sweden,* Switzerland, U. K.,* U. S., Yugoslavia. U.N. *Pub.* 1949. V. 9, p. 134.

Text of draft convention: U.N.Doc. E/CONF.8/47.

SUGAR PRODUCTION AND MARKETING. Protocol. London, August 31, 1949. Signatures and Text: *G.B.T.S.* No. 68 (1949), *Cmd.* 7817.

TRADE AND TARIFFS. Protocol of Terms of Accession. Lake Success, Oct. 10, 1949.

Signatures: Australia, Canada, France, Haiti, Lebanon, Netherlands, U. K. and U. S., *N.Y.T.*, Oct. 11, 1949, p. 5; Pakistan, Oct. 12, 1949, *N.Y.T.*, Oct. 13, p. 9; Southern Rhodesia, Oct. 25, 1949, *U.N.P.R.* ITO/183.

Text: *Cmd.* 7792; Dept. of State *Commercial Policy Series* 121.

U. N. E. S. C. O. London, Nov. 15, 1945.

Acceptances deposited: Israel and Pakistan, Sept. 14, 1949, *T.I.A.E.*, Oct., 1949, p. 20; Switzerland, July 6, 1949; Thailand, Dec. 29, 1948, *T.I.A.E.*, Aug., 1949, p. 32.

W.H.O. Constitution. New York, July 22, 1946. Ratifications deposited: Guatemala, Aug. 26, 1949, *N.Y.T.*, Aug. 27, 1949, p. 2; Korean Republic, Aug. 23, 1949, *N.Y.T.*, Aug. 24, p. 22.

WHITE SLAVE TRADE. Paris, May 18, 1904. Accession deposited: Lebanon. June 20, 1949. *T.I.A.E.*, Sept., 1949, p. 54.

WHITE SLAVE TRADE. Paris, May 18, 1904 and May 4, 1910. Protocol of Amendment. Lake Success, May 4, 1949.

Signature: Ceylon. July 14, 1949. *T.I.A.E.*, July, 1949, p. 22.

Ratifications deposited: Chile, June 20, 1949, Iraq, June 1, 1949, Netherlands, June 2, 1949, U.N. *Pub.* 1949. V. 9, pp. 80-81; Egypt,* Sept. 16, 1949; Switzerland, Sept. 23, 1949, *T.I.A.E.*, Sept., 1949, p. 52; Finland, Oct. 31, 1949, *T.I.A.E.*, Oct., 1949, p. 22.

DOROTHY B. DART

* With reservation.

JUDICIAL DECISIONS

BY WILLIAM W. BISHOP, JR.

Of the Board of Editors

[With the assistance of Miss Tommy F. Angell and Mr. Richard P. Bray, made possible by the W. W. Cook Legal Research Endowment of the University of Michigan Law School.]

Enemy property controls—freezing orders

PROPPER v. CLARK, ATTORNEY GENERAL. 69 S. Ct. 1333; 337 U. S. 472.
United States Supreme Court, June 20, 1949. Reed, J.

Action by the Attorney General, as successor plaintiff to the Alien Property Custodian, to recover royalties and obtain a declaration of title as against petitioner in property and assets owed by the American Society of Composers, Authors and Publishers (ASCAP) to an Austrian association of composers, authors and publishers. Petitioner had been appointed by a New York court as temporary receiver of the local assets of the Austrian association on June 12, 1941. On June 14, 1941, pursuant to section 5(b) of the Trading with the Enemy Act of 1917, as amended by the Joint Resolution of May 7, 1940, authorizing the President to forbid "any transfers of credit between . . . banking institutions as defined by the President," the President promulgated Executive Order No. 8785 prohibiting certain transactions involving Austrian property unless specifically licensed by the Secretary of the Treasury. On September 29, 1941, petitioner was appointed permanent receiver of the Austrian association. No license for the judicial order appointing him was asked or obtained.

The issues before the Court were first, whether petitioner obtained title to the claim for royalties, by relation back, at the time he was appointed temporary receiver; and second, whether the freezing order barred a subsequent unlicensed judicial transfer by the order appointing petitioner permanent receiver. In determining that ASCAP and petitioner were "banking institutions" as to bring them within the prohibition of Executive Order No. 8785, the Court said:

The phrase "banking institution" used and defined in the Bank Holiday Proclamation of March 6, 1933, 48 Stat. 1689, 1690, was adopted by the Emergency Banking Relief Act of March 9, 1933, 48 Stat. 1, with a delegation to the President of the power of definition. . . . The Act of March 9 was grafted on to the Trading with the Enemy Act of 1917 and when that Act was again extended to meet the foreign assets problem the President's wide power to define "banking institution" was a ready instrument to cope with the myriad circumstances

arising in the control of shifts of foreign assets. The power in peace and in war must be given generous scope to accomplish its purpose. . . . the transfer of this credit . . . owed by ASCAP . . . violates the prohibition against transfers of credit.

The Court further said:

It is our conclusion that the Joint Resolution of May 7, 1940, and the Executive Order of April 10, 1940, put into effect a valid plan for control of the property covered by the regulation that prohibited any change of title to that property by reason of the subsequent appointment of petitioner as permanent receiver. . . . We base our determination on the purpose of Congress to prevent shifts in title to blocked assets and the prohibition of the Executive Order against transfers of such a credit as this.

The Court then went on to decide that petitioner's title did not relate back to the time of his temporary appointment.*

Vessel on high seas—law applicable to salvage by own crew

USATORRE ET AL. v. M/T VICTORIA, Cía. ARGENTINA DE NAVEGACIÓN MIHANOVICH LTDA. 1949 A.M.C. 650; 172 F. (2d) 434.

U. S. Ct. App., Second Circuit, Jan. 27, 1949. Frank, Ct. J.

An Argentine vessel was damaged by torpedo attack on the high seas, and the crew left the vessel on the master's orders. When the crew sued as salvors, the question was raised whether there was such abandonment as to terminate articles and permit the crew to return as salvors. The district court held that this being a salvage claim, the "*jus gentium*" applies, and that under it there was such abandonment of the ship as to terminate the voyage and permit crew members to return as salvors; no finding was made as to Argentine law on the point. The appellate court reversed and remanded for finding of Argentine law, stating this question ". . . must be determined, as a matter of the 'internal economy' of the ship, by the Argentine law, the 'law of the flag.'"

Effect of transfer of property under Nazi duress—U. S. courts

BERNSTEIN v. N. V. NEDERLANDSCHE-AMERIKAANSCH. STOOMVAART MAATSCHAPPIJ. 173 F. (2d) 71.

U. S. Ct. App., Second Circuit, Feb. 21, 1949. A. Hand, Ct. J.

Plaintiff appealed from a decision, 79 F. Supp. 38, this JOURNAL, Vol. 43 (1949), p. 180 (S. D. N. Y., Aug. 12, 1948), dismissing his amended complaint in his efforts to recover vessels allegedly taken from him by duress and coercion while he was himself in detention in Germany as a German Jewish person allegedly suspected of exchange control violations shortly

* Mr. Justice Jackson dissented on the ground that "ASCAP is not a banking institution," and Mr. Justice Frankfurter dissented in part.

before the outbreak of the war, on the ground that the statute of limitations had run and had not been tolled by war. Affirming in part, and modifying in part and remanding to the district court, the Court of Appeals held that the New York laws, as amended in 1948, did not bar the action by lapse of time. "Any interference with defendant's right to invoke the statute of limitations caused by the retroactive legislation was within the powers of the Legislature and did not violate due process," citing *Chase Securities Corp. v. Donaldson*, 325 U. S. 304 (1945), and *Campbell v. Holt*, 115 U. S. 620 (1885) as to the Federal Constitution, and *Robinson v. Robins Dry Dock*, 238 N. Y. 271 (1924) as to that of New York.

Discussing the merits of plaintiff's complaint, which originally charged coercion by Nazi officials, and which after the decision in *Bernstein v. Van Heyghen Frères S.A.*, 163 F. (2d) 246, this JOURNAL, Vol. 42 (1948), p. 217, was amended to state that plaintiff "was given to understand by his own attorneys, and led to believe, that it was imperative for his personal safety" that he surrender control of the Red Star Line and its vessels, the court said, in part:

We think the judge could properly have denied it [the amended complaint] on the ground that the plaintiff failed to specify the class of persons which exercised duress . . .

Because of our decision in the Van Heyghen case and the plaintiff's former flat allegations that the duress was caused by Nazi officials, any amendment must contain an allegation that the duress was not caused by the action of such officials and in addition should specify with reasonable detail the persons by whom, and the manner in which, the duress was exercised. The fact that statements were made to the plaintiff advising him of danger to the lives and property of himself and his family would not satisfy the test laid down in the Van Heyghen case, if in fact that danger flowed from the acts or threatened acts of Nazi officials. Nor would it show duress by anyone if the plaintiff's lawyer or others merely conveyed to him their belief based upon an independent appraisal of conditions in Germany that there was danger to himself, his family, or his property, if he did not part with his stock.¹

¹ After this decision the Department of State made public (Dept. of State Press Release No. 296, April 27, 1949, Dept. of State Bulletin, Vol. XX, No. 514 (May 8, 1949), pp. 592-593; quoted in part in 1949 A.M.C. 1237), a letter dated April 13, 1949, from Jack B. Tate, Acting Legal Adviser of the Department of State, to plaintiff's counsel, discussing the holding in *Bernstein v. Van Heyghen Frères S.A.* and its application to the instant case, which read in part as follows:

"You have inquired whether the Department might care to express its view concerning the Executive policy of this Government with respect to the exercise by courts of this country of jurisdiction in such cases. The Department considers the matter an important one and is pleased to express its views as follows:

"1. This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls. [Citing various declarations of policy, directives to American occupation forces, and Military Government Laws of the U. S. Zone in Germany.] . . .

Dealing with appellees' contention that plaintiff lacked status to intervene in his capacity as receiver for the Red Star Line appointed by the New York courts, since in 1945 the British Military Government in Germany appointed a liquidator, the court held that the existence of a foreign liquidator did not prevent suit here by a receiver against defendant corporation, which was doing business in New York. Nor did the intervention of the receiver conflict with the Paris Agreement on Reparations among the eighteen Western Powers, effective January 14, 1946, entitling each country to use toward its share of reparations German external assets having a situs in the country; there was no reason to suppose that any signatory had seized the claim of the Red Star Line against defendant, and the Rules of Accounting for German External Assets approved November 21, 1947, by the Inter-Allied Reparation Agency permitted each country to exclude from the total of German assets charged to it under the Agreement, assets in which there are direct or indirect non-German interests. On this point the court added, however, that it did "not say that if an authorized representative of the United States Government should attempt to seize the claim to the proceeds of the ships, such an action would not preclude further adjudication in the present litigation."

Diplomatic immunity—domestic servant of embassy

CARRERA v. CARRERA. 174 F. (2d) 496.

U. S. Ct. App., D. C., Feb. 28, 1949. Miller, Ct. J.

A wife sued for separate maintenance and for custody and support of fifteen-year-old son, both parties being nationals of Ecuador permanently resident in the United States and domestic servants in the Czechoslovakian Embassy in Washington. Defendant moved to quash the return of service and to dismiss the complaint, claiming diplomatic immunity, which the Czechoslovakian Ambassador requested for him in a communication to the Secretary of State. The Department of State informed the judge of the District Court for the District of Columbia that: "The name of Mr. Carrera has been previously registered in the Department of State in accordance with Section 254 of Title 22 of the United States Code and has been included in the 'List of Employees in the Embassies and Legations in Washington not printed in the Diplomatic List,' commonly known as the 'White

"2. Of special importance is Military Government Law No. 59 which shows this Government's policy of undoing forced transfers and restituting identifiable property to persons wrongfully deprived of such property within the period from January 30, 1933 to May 8, 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism. Article 1 (1). It should be noted that this policy applies generally despite the existence of purchasers in good faith. Article 1 (2).

"3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

List,' which has been transmitted by the Secretary of State to the Marshal of the District of Columbia.' The District Court dismissed complaint on the ground of defendant's diplomatic immunity. Affirmed on appeal.

Answering the contention that defendant's diplomatic immunity was not properly presented to the District Court, the court found that the claim of immunity was communicated by the process approved by the Supreme Court in *In re Baiz*, 135 U. S. 403, 421 (1890); and stated:

It is enough that an ambassador has requested immunity, that the State Department has recognized that the person for whom it was requested is entitled to it, and that the Department's recognition has been communicated to the court.

The court distinguished the present case from *Trost v. Tompkins*, 44 Atl. (2d) 226, (D. C. Mun. App. 1945), stating:

But in the *Trost* case the court held no more than that, certification of the Secretary of State being absent, a court otherwise having jurisdiction should determine whether the person claiming immunity was properly placed on the "White List." But here, the Secretary having certified Carrera's name as included in the list, judicial inquiry into the propriety of its listing was not appropriate.

Appellant contended that under 22 U. S. Code, § 254, immunity did not extend to an inhabitant of the United States in the service of an ambassador, when "the process is founded upon a debt contracted before he entered upon such service"; and that in this case the child for whom support was sought was born before defendant began to serve the Ambassador. The court held that the parent's obligation to support his infant child was not a "debt" within this exception. The court also rejected appellant's contention that diplomatic immunity did not apply in the field of domestic relations, pointing out that in *State of Ohio ex rel. Popovici v. Agler*, 280 U. S. 379 (1930), this JOURNAL, Vol. 24 (1930), p. 382, cited by appellant, no issue of diplomatic immunity was raised, the person concerned being a vice consul rather than one having diplomatic status.

Jurisdiction to review war crimes tribunal—U. S. rather than international court

EISENTRAGER ET AL. v. FORRESTAL. 174 F. (2d) 961.

U. S. Ct. App., D. C., April 15, 1949. Prettyman, Ct. J.

Appellants were civilians of German nationality employed in China prior to May 8, 1945, by the German Government. After the German surrender on that date they were until August 15, 1945, in the part of China under the control of Japanese forces, which continued to wage war against the United States until the Japanese surrender. In 1946 they were charged with violation of the laws of war in engaging in military activity against the United States after the German surrender, and were tried and convicted

by a United States military commission in China. They were imprisoned in Germany under the charge of an American army officer. Appellants sought *habeas corpus* in the District Court for the District of Columbia, alleging that their jailer was under the direction of respondents, the Secretary of Defense, Secretary of the Army, Chief of Staff of the Army, and the Joint Chiefs of Staff of the United States. The district court judgment dismissing the petition for want of jurisdiction was reversed and remanded.

Pointing out that "no question of international action or authority is presented" (in contrast to *Hirota v. MacArthur*, 338 U. S. 197, this JOURNAL, Vol. 43 (1949), p. 172), the court said that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ," even though he may be an enemy alien and even though he may be held in custody outside the United States. Appellants alleged that their confinement was in violation of the Constitution and laws of the United States and of the Geneva Convention of July 27, 1929. Determination of that question was within the jurisdiction of the District Court, since:

The question here is not whether a court, either state or federal, can exercise its judicial power within the jurisdiction of another and independent government. The question is whether it can exercise that power upon those Government officials within its territorial jurisdiction who have directive power over the immediate jailer outside the United States but acting solely upon authority of this Government.

[Note: This decision was followed in denying respondents' motion to dismiss a petition for writ of *habeas corpus* sought by an American citizen arrested in Tokyo during the Allied occupation, tried by an American general provost court in Japan, and sentenced to imprisonment. *In re Bush*, 84 F. Supp. 873 (District Court, D. C., June 21, 1949, Holtzoff, D. J.). Here the chief argument was as to the international, or solely American, nature of the tribunal. Examining the arrangements for the exercise of authority in Japan, and the dual capacities of General MacArthur as the Supreme Commander of Allied Powers and as the general in command of American occupation forces, the court said, in part:

the Far Eastern Commission cedes whatever jurisdiction it may have and provides for the trial of criminal offenses committed by nationals of any of the occupying powers by military courts of the nationality of the accused. The situation is very similar to that under which this country exercised extraterritorial jurisdiction in China until a few years ago . . . this country established an extraterritorial court there to exercise that jurisdiction. That court was a court of the United States, although sitting in China. Similarly we find that the Far Eastern Commission cedes to the United States authority to try its own nationals when accused of committing criminal offenses in Japan.

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The conclusion necessarily follows that a general provost court operating under these directives [issued by General MacArthur] is not an international tribunal, but is a tribunal of the United States to which an international commission has ceded jurisdiction.]

Naturalization—continuous residence—American-owned vessel under foreign flag

UNITED STATES *v.* CAMEAN. 174 F. (2d) 151.

U. S. Ct. App., Second Circuit, May 5, 1949. L. Hand, C. J.

The Nationality Act of 1940 provides, 8 U. S. C. A., Sec. 725, that in place of continuous residence an alien may substitute the period of any service "on board vessels of more than twenty tons burden, whether or not documented under the laws of the United States, and whether public or private, which are not foreign vessels, and whose home port is in the United States." In affirming an order of the U. S. District Court for the Southern District of New York admitting the seamen petitioner, the court held that ships registered in the Republic of Panama, owned by corporations organized under its laws, but whose stock was owned by corporations organized under the laws of States of the United States, whose crews were signed on and discharged in the United States, and which plied between the United States and foreign ports, were "not foreign vessels" within the meaning of the section cited. The court said:

. . . we find some confirmation of this in the use of the phrase, "American owned," in an earlier section of the same Act [707(d)] which almost certainly has the same content as "not foreign vessels" in the section at bar. Certainly it would be extreme literalism to hold that the ships here in question were not "American owned." . . .

War crimes tribunals in Germany—international nature prevents U. S. review

FLICK *v.* JOHNSON. 174 F. (2d) 983.

U. S. Ct. App., D. C., May 11, 1949. Proctor, Ct. J.

A German national held in prison in Germany in the American Zone of Occupation, after being tried and convicted of war crimes by a military tribunal in that Zone, unsuccessfully petitioned for *habeas corpus* in the District Court for the District of Columbia. On appeal, the dismissal of the petition was affirmed, on the ground "that the tribunal which tried and sentenced Flick was not a tribunal of the United States" and that hence the United States courts were "without power to review its judgment and sentence." In arriving at this conclusion, the court said, in part:

Upon the surrender of Germany, the Four victorious Powers, the United States, Great Britain, France and Russia, completed military control of the conquered land. Agreeably to plan, the armies of each occupied a separate zone. It was agreed that supreme authority over Germany would be exercised, on instructions from their Governments,

by the Commanders in Chief, "each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole." At the same time a "Control Council" was constituted, composed of the four Commanders in Chief, as the supreme governing body of Germany. This plan of operation was expressly limited to the period of occupation "while Germany is carrying out the basic requirements of unconditional surrender." (That period has continued since, and still prevails.) . . . (Declaration of Berlin, June 5, 1945, 12 U. S. Dept. of State Bull. 1054.)

In support of the foregoing arrangement for the temporary government of Germany, the President of the United States, acting through his Joint Chiefs of Staff, directed the Commander in Chief of the American Forces in Germany, in his capacity as Military Governor of the American Zone of Occupation, to carry out and support, in that Zone, the policies agreed upon in the Control Council, whose authority "to formulate policy and procedures and administrative relationships with respect to matters affecting Germany as a whole will be paramount throughout Germany." . . .

In order to give effect to the terms of the Moscow Declaration of October 30, 1943 (9 U. S. Dept. of State Bull. 310) and the London Agreement of August 8, 1945, and the Charter issued pursuant thereto, (13 U. S. Dept. of State Bull. 222) and "in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, * * *" the Control Council enacted "Law No. 10," December 20, 1945 (15 U. S. Dept. of State Bull. 862 (1946)). This act recognizes many crimes, which are classified and defined in broad terms. It prescribes punishment for those found guilty, and provides that "The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone." (Sec. 2, Art. III, C. C. Law No. 10, *supra*.)

The Moscow Declaration and the London Agreement, referred to above, proclaimed the intention of the United Nations to bring war criminals to justice. To that end the London Agreement provided for establishment "after consultation with the Control Council for Germany" of an International Military Tribunal for the trial of war criminals whose offenses had no particular geographical location. It was this court which tried Goering and other high Nazi officials. . . .

Ordinance No. 7, Military Government—Germany, was promulgated October 18, 1946, pursuant to the powers of the Military Governor for the United States Zone of Occupation and "pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10. * * *" Its declared purpose was "to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10." . . . Pursuant to the ordinance, General Clay, then Military Governor and Zone Commander, on April 12, 1947, constituted "Military Tribunal IV," designated the members thereof, and directed them to convene at Nuremberg, Germany, to hear such cases as might be filed by the Chief of Counsel for War Crimes. . . . This was the tribunal before which Flick was tried, convicted and sentenced upon an indictment filed by said Counsel. . . .

The foregoing summary brings out the salient facts bearing upon the status of Military Tribunal IV, which tried and sentenced Flick. He contends that it was not an international court, but an illegally constituted body, wrongfully exercising power as a military tribunal. The argument in support of this contention overlooks important facts. . . . If the court was not a tribunal of the United States, its actions cannot be reviewed by any court of this country. . . . [citing *Hirota v. MacArthur*, 338 U. S. 197, this JOURNAL, Vol. 43 (1949), p. 172]. If it was an international tribunal, that ends the matter. We think it was, in all essential respects, an international court. Its power and jurisdiction arose out of the joint sovereignty of the Four victorious Powers. The exercise of their supreme authority became vested in the Control Council. That body enacted Law No. 10, for the prosecution of war crimes. It vested in the Commander for the American Zone the authority to determine and designate, for his zone, the tribunal by which accused persons should be tried and the rules and procedure to govern in such cases. Pursuant to that power, and agreeably to rules promulgated by Ordinance No. 7, the Zone Commander constituted Military Tribunal IV, under whose judgment Flick is now confined. Thus the power and jurisdiction of that Tribunal stemmed directly from the Control Council, the supreme governing body of Germany, exercising its authority in behalf of the Four Allied Powers.

the declared purpose of Control Council Law No. 10 was to give effect to the London Agreement and "to establish a uniform legal basis in Germany for the prosecution of war criminals * * * other than those dealt with by the International Military Tribunal." . . . So we think there is no conflict between the two enactments. Rather do they complement each other. . . .

Concededly, the International Military Tribunal, established under the London Agreement, was a court of international character. How, then, can it be said that Military Tribunal IV was not of the same character, with its existence and jurisdiction rooted in the sovereignty of the Four Powers, exercised jointly through the supreme governing authority of the Control Council? We think, therefore, that the tribunals established under its authority were legitimate and appropriate instruments of judicial power for the trial of war criminals. (See 39 Am. J. Int'l Law, 1945, at pg. 525.)

Expatriation—naturalization in a foreign state

SCHIOLEB v. SECRETARY OF STATE. 175 F. (2d) 402.

U. S. Ct. App., Seventh Circuit, May 19, 1949. Minton, Ct. J.

In an action by plaintiff for a declaratory judgment that she was a citizen of the United States, defendant contended that American citizenship had been lost pursuant to 8 U.S.C.A., sec. 801, which provided that nationality would be lost by "Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person. . . ." On appeal from a judgment for plaintiff in the U. S. District Court for the Northern District of Illinois, 75 F. Supp. 353, this JOURNAL, Vol. 42 (1948), p. 724, the court said:

There is no finding that Denmark ever granted naturalization to the plaintiff upon her application or any other application. According to Sec. 801, the plaintiff could have lost her American citizenship only if she had obtained naturalization in Denmark upon her own application. The burden was therefore upon the Secretary to substantiate the allegations contained in his answer. . . .

Expatriation—residence abroad of naturalized citizen—constitutionality

LAPIDES v. CLARK, ATTORNEY GENERAL. 176 F. (2d) 619.
U. S. Ct. App., D. C., May 23, 1949. Proctor, Ct. J.

Appellant, a naturalized citizen, went to Palestine in 1934 and remained there until 1947. On return to the United States he presented his certificate of citizenship and was excluded on the ground that he had expatriated himself under Sec. 804, 8 U.S.C.A., which provides that "A person who has become a national by naturalization shall lose his nationality by: . . . (c) Residing continuously for five years in any other foreign state. . . ." None of the exceptions applied to appellant. On appeal from an order of the district court dismissing the suit for a judgment declaring him to be a national of the United States, the court said:

Expatriation is a natural and inherent right of all peoples. . . . Congress has implied power to provide therefor. *Mackenzie v. Hare*, 239 U. S. 299, 311. . . . Obviously it cannot draw arbitrary and groundless distinctions between citizens. *Hirabayashi v. United States*, 320 U. S. 81, 100. . . . However, where classification has reasonable relation to legitimate legislative ends and is supported by considerations of policy and practical convenience, it is not arbitrary. . . . The guaranty of due process demands only that a law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a reasonable and substantial relation to the object sought to be obtained. . . . The statute has a purpose in the international policy of our government. The Act does not arbitrarily impose a loss of citizenship. It deals with a condition voluntarily brought about by one's own acts, with notice of the consequences. In that sense there is concurrence by the citizen.

Edgerton, Ct. J. (dissenting), was of the opinion that the Constitution did not empower Congress "to deprive citizens either at or after naturalization of liberties that other citizens enjoy. 'The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away.' *United States v. Wong Kim Ark*, 169 U. S. 649, 703. . . ."

Jurisdiction—crime committed in part abroad

SACHS v. GOVERNMENT OF THE CANAL ZONE. 176 F. (2d) 292.

U. S. Ct. App., Fifth Circuit, July 19, 1949. Hutcheson, Ct. J.

Upholding a conviction by the United States District Court for the Canal Zone, despite defendant's contention that he uttered the statements alleged to be libelous while he was in Panama rather than in the Canal Zone, the court said, in part:

It is hornbook law that at common law a criminal prosecution for libel might be, and in the absence of statutory provisions to the contrary, it is generally held in the United States, that a criminal prosecution for libel may be instituted in any jurisdiction where the libelous article was published or circulated, irrespective of where such article was written or printed. . . .

Appellant's contention that he could, standing or being outside of the Canal Zone, write all of the libelous articles he wanted to, deliver them to a newspaper in, or its representative outside of, the Canal Zone for publication there, and escape punishment, is wholly without merit.

Expatriation—effect of renunciation under duress—Japanese relocation center

ACHESON v. MURAKAMI, SUMI AND SHIMIZU. 176 F.(2d) 953.

U. S. Ct. App., Ninth Circuit, August 26, 1949. Denman, Ct. J.

Plaintiffs, American-born citizens of Japanese descent, had been interned during the war in one of the Japanese relocation centers. Between December, 1944, and March 1945, they applied to renounce their citizenship under the provisions of Sec. 401 of the Nationality Act of 1940 as amended, 8 U.S.C. Sec. 801(1), and the renunciations were granted. In 1948 they applied for United States passports and were refused on the ground that they were no longer citizens.

In affirming the finding of the district court that the renunciations were "not as a result of their free and intelligent choice but rather because of mental fear, intimidation and coercions depriving them of the free exercise of their will, [and] said purported renunciations are void and of no force or effect," the court gave full consideration to the underlying facts and their effect upon the minds of those interned in the relocation centers. The court said:

Underlying all the particular factors so found as leading to a condition of mind and spirit of the American citizens imprisoned at Tule Lake Center, which make the renunciations of citizenship not the free and intelligent choice of appellees, is the unnecessarily cruel and inhuman treatment of these citizens (a) in their deportation for imprisonment and (b) in their incarceration for over two and a half years under conditions in major respects as degrading as those of a penitentiary

and in important respects worse than in any federal penitentiary, and (c) in applying to them the Nazi-like doctrine of inherited racial enmity, stated by the Commanding General ordering the deportations as the major reason for that action.

Enemy property—U. S. controls

CLARK, ATTORNEY GENERAL *v.* AMERICAN LECITHIN COMPANY *

U. S. Dist. Ct., N. D. Ohio, Oct. 15, 1947. Freed, D. J.

The Alien Property Custodian under provisions of Sec. 17 of the Trading with the Enemy Act, 50 U. S. C. A. App. 17, was issued by defendant corporation fifteen shares of common stock which had been found the property of a German alien. The stock was issued with an option in the corporation to repurchase, and this was an appeal to the court by the Attorney General, as successor to the Custodian, to compel the defendant to issue the stock free of option or claim of option to repurchase. In granting plaintiff's motion for judgment on the pleadings, the court held that Sec. 9 of the Act made complete provision for the protection of the defendant's right to assert its claim, and any action by him must be brought pursuant to those provisions. The court then said:

Consonant with the need for speedy reduction of alien property to the possession of the United States in a war emergency, sweeping power is conferred on the Custodian. . . . It is apparent that in the exercise of such authority private rights must be subordinated to the national welfare. And if in the course of carrying out this vital task there occurs a temporary encroachment on the rights of private citizens, it is sufficient if the law provides adequate and proper restitution. The Act contemplates at the outset the acquisition of all alien owned property without limitations or conditions attached.

Consular jurisdiction over seamen—U. S.-Greek treaty

PETITION OF GEORGAKOPOULOS. 85 F. Supp. 37.

U. S. Dist. Ct., E. D. Pa., Jan. 28, 1949. Welsh, D. J.

Petitioner, representing the Greek Consul in Philadelphia, requested an order for the arrest and removal from a Greek vessel of four of its Greek seamen, and for their repatriation to Greece to answer charges of offenses against Greek law. The petition was based on Art. 12 of the Greek Consular Convention of 1902, 33 Stat. 2129, providing that consuls and consular agents shall have exclusive charge of the internal order of merchant vessels of their nation, and that the courts of the United States shall render forcible aid in such matters. An agreement pursuant to the Seaman's Act of 1915, 38 Stat. 1164, ended the exclusive jurisdiction of the consul in wage matters (1916 For. Rel. 41-42).

* Ms. opinion supplied by Dr. Martin Domke.

Respondents were merchant seamen, members of a union dissolved by the Greek Government in February, 1948. Contrary to a regulation issued by the Greek Government in November, 1947, respondents' union and its members continued to demand extra pay for opening and closing hatches. Respondents had refused to open hatches without extra pay, and pursuant to Greek regulation had been charged with disobedience and mutiny. There was no evidence that they failed to obey orders other than their refusal to open the hatches without extra pay. In holding that the Treaty of 1902 was in force, as amended with respect to wage disputes, and that jurisdiction of the court was dependent on proof of disorders other than those relating to wages, the court said:

We are required, however, to render forcible aid to consular officers to arrest persons composing a crew in any matter within the exclusive charge of the consular officer. Matters involving a breach of the peace or trouble in port, and those in which jurisdiction is established by other authority are excluded. The Seamen's Act of 1915 gave jurisdiction to this Court of claims for wages by seamen, both American and foreign, and the sections of the treaty giving exclusive jurisdiction to consuls in matters of wages and execution of contracts were abrogated by amendment. It would therefore appear that where the facts justify a finding that the issue involves an adjustment of a wage dispute between a ship owner or officers and crews, the matter is not one of exclusive consular jurisdiction in which he may seek the aid of the Court; and where this Court has concurrent jurisdiction with the Consul, it may not extend its forcible aid in his summary disposition of wage matters not within his exclusive jurisdiction.¹

War—effect on statute of limitations which limits the right

FRABUTT v. NEW YORK, CHICAGO & ST. LOUIS R. CO. 84 F. Supp. 460.
U. S. Dist. Ct., W. D. Pa., May 25, 1949. Gourley, D. J.

This is a proceeding under the Federal Employers' Liability Act, 45 U. S. C. A., sec. 51, to recover damages for the death of Berardino Campagna, who was an employee of defendant railroad. Decedent's family were non-resident aliens, residing in Italy. Decedent's death occurred on December 31, 1942 at which time Italy and the United States were officially at war, and the action was brought by the administrator of the estate on July 12, 1948. Defendant set up the statute of limitations, fixed by the Act conferring the right, as a defense. In refusing a motion of the defendant for summary judgment as to that part of the complaint in which plaintiff demanded a right to recover on behalf of the family, the court said:

It appears by a firmly established principle of international law that the existence of a state of war between two countries or powers is effective to suspend the running of statutes of limitations as between

¹ For previous proceedings in this case, see *Petition of Georgakopoulos*, 81 F. Supp. 411 (Dec. 16, 1948), this JOURNAL, Vol. 43 (1949), p. 377.

the citizens of such countries or powers at war. . . . On the restoration of peace all rights suspended during hostilities, or which remain dormant, are revived, and the statute of limitations again becomes operative. The rule . . . is one of international law which the courts attach to, or read into, statutes of limitations, though it is not expressed in them; and it is applicable irrespective of whether the limitation in the particular statute of limitations is considered to be a limitation of the right or liability, or of the remedy. . . . The reason for this modern rule lies in the fact that during the war the courts of either belligerent country are necessarily closed to the citizens of the other, since the law of nations forbids any intercourse between citizens of belligerent powers.

The court held that, since peace was not officially declared between the United States and Italy until September 15, 1947, the statute of limitations was no bar to the right of the decedent's family to recover.

Naturalization—continuity of residence

APPLICATION OF VILORIA. 84 F. Supp. 584.

U. S. Dist. Ct., D. Hawaii, June 16, 1949. Metzger, D. J.

Petitioner, born a national but not a citizen of the United States in the Philippine Islands, established residence in Hawaii in 1928, where he remained until sent to Guam as a civilian employee by the U. S. Army in 1946. On July 4, 1946, by proclamation of the President of the United States, all Filipino citizens became aliens to the United States. Petitioner failed to apply between July 2 and July 4, 1946, for citizenship under the terms extended to nationals under the proclamation. He was returned to Hawaii in 1947, and sought naturalization in October, 1948, under sec. 307 of the 1940 Nationality Act, which requires at least five years' continuous residence in the United States immediately preceding naturalization, and provides that absence for one year breaks the continuity.

In overruling a motion to deny the application (apparently on the ground that residence in Guam was not "in the United States"), the court said:

Absenteeism as referred to in the Nationality Act, although not therein qualified, must mean an absence either from indifferent carelessness, or one that would tend to create an implication that the subject had elected to change his place of residence and remain away by voluntary and sentimental choice, or to serve some purpose contrary to love and attachment and fidelity to American institutions, and not through duty or obligation to the United States Government; had he been informed of the passing state of the law and had an opportunity available on Guam, and had filed his petition as a national, between the limited dates of July 2 and July 4, 1946, this case could not be in court as his rights to maintain an application for citizenship were then fully established. I do not believe that he forfeited them by his continuing subservience to the government.

Naturalization—attachment to principles of United States Constitution

PETITION OF FORTE. 84 F. Supp. 738.

U. S. Dist. Ct., D. Mass., June 20, 1949. Wyzanski, D. J.

Sec. 307(a) of the Nationality Act of 1940 requires that an applicant for naturalization must be "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States" during the five-year period preceding the filing of his petition. The court held that inactive participation in the Fascist party in Italy, and the expression in November, 1941, of a wish to a friend in Italy that the Axis win the war "to cause to disappear those Jews who are destroying the world," was not sufficient to deny his taking the oath of allegiance where it was shown that he had maintained no ties with the Fascist party in the United States, and had demonstrated no "hostile action against any of his neighbors of any faith."

Nationality—loss of—resulting from Philippine independence

CABEBE v. ACHESON, SECRETARY OF STATE. 84 F. Supp. 639.

U. S. Dist. Ct., D. Hawaii, June 23, 1949. McLaughlin, J.

Petitioner, born in the Philippine Islands and since 1930 a resident of Hawaii, sought to have the court declare him to be a "national of the United States." In dismissing the petition the court said:

Upon the date when the Republic of the Philippines became a free and independent nation the foundation for petitioner's claim to being a national of the United States vanished. On that date, too, by Article IV of the constitution of the new republic petitioner became a citizen thereof and to it owed allegiance. Prior thereto he had been a national of the United States only because the place where he was born belonged to the United States as a possession. When that fact no longer obtained—whether he liked it or not—petitioner could no longer qualify . . .

Diplomatic immunity—effect of resignation from legation staff

MONGILLO ET AL. v. VOGEL; COLL v. VOGEL. 84 F. Supp. 1007.

U. S. Dist. Ct., E. D. Pa., June 29, 1949. Bard, D. J.

On July 6, 1948, defendant, press counselor of the Rumanian Legation in Washington, injured plaintiffs in an automobile collision in Pennsylvania. On July 8 and 12, 1948, service was made on defendant in Pennsylvania. Prior to July 21, 1948, defendant resigned his position with the Legation and turned in his diplomatic identification card. On defendant's motion to dismiss the actions or, in lieu thereof, to quash return of service of summons, on ground of diplomatic immunity, motion to quash return of service was granted, since defendant was clothed with diplomatic immunity when the summonses were served. The court commented, however,

that, after having resigned from the Rumanian Legation, defendant was no longer entitled to immunity.

Naturalization—claim under treaty of exemption from military service

PETITION OF MOSER. 85 F. Supp. 683.

U. S. Dist. Ct., E. D. N. Y., July 15, 1949. Kennedy, D. J.

Petitioner for naturalization, a Swiss native, entered the United States in 1937 and in 1938 petitioned for naturalization. Before action thereon was completed, on May 11, 1940, petitioner was ordered to return to Switzerland as an active officer of the Swiss Army. In October, 1940, he returned to the United States, retaining his status as a Swiss army officer on leave. On October 19, 1940, he registered in the United States under the Selective Service Act of 1940 (50 U. S. C. A. App., § 301 *et seq.*). He sought advice from the Swiss Legation regarding his obligation for military service in the United States, having in mind the Convention of Nov. 25, 1850, between the United States and Switzerland (11 Stat. 587). The State Department decided that the Selective Service Act of 1940 was not intended to deny Swiss nationals any rights or privileges conferred on them by the treaty, and expressed the view that filing a claim for exemption from military service by a non-declarant friendly alien should not operate as a waiver or forfeiture of the right to be naturalized. Petitioner executed in 1944 a revised claim for exemption form, in which the reference to the effect of exemption upon future naturalization was relegated to a footnote. Evidence discloses that petitioner took no steps to obtain naturalization under the petition filed in 1938, which he considered invalidated by his re-entry in 1940 under the immigration quota, but which he fully disclosed to authorities considering his exemption from service.

The Naturalization Service contended that the Selective Service Act of 1940 superseded the Convention of Nov. 25, 1850, and that as a matter of law Moser, by seeking exemption from military service, had waived his right to be naturalized. The court found that the provisions of the Act may not be inconsistent with the treaty, and that:

Nothing could be clearer than the fact that our own State Department recognized the immunity that Moser had under the treaty. Nor could anything be plainer . . . than the fact that Moser never would have signed the revised form D. S. S. 301 if it were to be treated as a waiver of naturalization in the future. And so, assuming that the State Department made an egregious error, concurred in by the Selective Service Bureau and the Swiss Legation, I cannot see how that can be translated into a waiver by Moser of an important privilege, no matter what he signed upon the advice of these responsible agencies. In other words, even if the Swiss Treaty was intended to be broken by those who enacted the Selective Training and Service Act of 1940, I find as a fact that there never was a waiver of naturalization by Moser and that the petition should be granted.

Expatriation—service in armed forces of a foreign state

ISHIKAWA v. ACHESON, SECRETARY OF STATE. 85 F. Supp. 1.

U. S. Dist. Ct., D. Hawaii, Aug. 12, 1949. McLaughlin, J.

Plaintiff was born of alien parents in Hawaii and thereby acquired the dual status of being a citizen of the United States and a subject of Japan. In 1939 he went to Japan to study at the expense of the Japanese Government. In May of 1945, while working as an interpreter in the Japanese Consulate in China, he was drafted into the Japanese Army, and having no way of escaping into Free China, he obeyed the order. He was discharged in August of 1945. Application for a passport to return to the United States was denied on the ground that by virtue of serving in the Army of Japan he had lost his U. S. citizenship. In allowing plaintiff's petition for a declaratory judgment that he is a citizen, the court said:

Section 801(c) of Title 8 United States Code Annotated has been authoritatively construed as effecting expatriation only if the national of the United States entering or serving in the armed forces of a foreign state without express authority under the laws of the United States acted voluntarily and without legal or factual compulsion. *Dos Reis v. Nicholls*, 1 Cir., 1947, 161 F. 2d 860. . . .

Expatriation—acts under duress

MEIJI FUJIZAWA v. ACHESON. 85 F. Supp. 674.

U. S. Dist. Ct., S. D. Calif., Aug. 23, 1949. Weinberger, D. J.

The plaintiff, a national of the United States by birth, though of Japanese ancestry, went to Japan in June, 1939, to complete certain studies prior to entering the import-export business in the United States. In order to make certain that he retained his U. S. citizenship, he initiated renunciation of his possible Japanese nationality before leaving the United States, such renunciation being accomplished in October, 1939. He avoided such military service in Japan as was required of Nisei; and completed his studies in 1943, at which time he could not return to the United States and had to find employment to support himself. In order to secure employment it was necessary for him to register his name on the Family Register and as a prerequisite to that step he had to apply for "recovery" of his Japanese nationality. Plaintiff obtained employment as an interpreter in the Oeyama Prisoners of War Camp; and after V-J day was employed by the United States military authorities in Japan. On July 30, 1947, he applied at the United States Consulate at Kobe, Japan, for registration as a United States national, and registration was denied on the ground that plaintiff had lost his U. S. nationality by obtaining naturalization in a foreign state. Plaintiff brought this action to establish his claim as an American citizen.

After reviewing the evidence, particularly that relating to the necessity for plaintiff's having his name on a Family Register in Japan to obtain

employment and to his actions during the course of his residence in Japan, the court found:

in the light of conditions shown to exist, and considering plaintiff's acts before and after such application, that the application for "recovery" which the defendant contends resulted in the loss of plaintiff's United States citizenship, was not the free and voluntary act of the plaintiff; that plaintiff never, at any time intended to renounce or relinquish his United States citizenship; that plaintiff is, and has been, since his birth, a citizen of the United States.

Treaties—effect of treaty withdrawing claim from jurisdiction

HANNEVIG v. UNITED STATES. 84 F. Supp. 743.

U. S. Court of Claims, July 11, 1949. Littleton, J.

Plaintiff, a national of Norway engaged in the construction and operation of ships in world commerce, entered into contracts in March, 1917, with shipbuilding companies in Delaware and New Jersey for the construction of cargo ships. The United States requisitioned the contracts in August, 1917. The plaintiff alleges that, by its act of requisitioning and the taking over of possession, the defendant assumed the payment of sums loaned to the construction companies by the plaintiff. It was further alleged that the plaintiff on the request of the Government has made a further loan to the construction companies, and that defendant by implication and express promise assumed the payment of this amount.

In allowing a motion to dismiss filed by the defendant, on the ground that the court had no jurisdiction by virtue of the ratification of the Claims Convention between the United States and Norway, signed March 28, 1940, providing for the settlement of the claim of the Government of Norway on behalf of the plaintiff against the United States, the court said:

We think the rule upon which plaintiff relies [that the Convention ratified April 30, 1948 did not supplant existing law, but was a mere contract and should not be construed as divesting the court of jurisdiction] is not applicable here. The treaty deals specifically with plaintiff's claim and it requires no additional legislation insofar as the right and authority conferred thereby to settle the claim by diplomatic means is concerned. . . . The treaty making power embraces the rights and privileges of foreign nationals, and settlement of claims such as the one here involved has long been recognized as a proper subject of treaties and international agreements. *Santovincenzo v. Egan*, 284 U. S. 30. . . .

International claims—domestic commission—question of right to share in award

LUCKHARDT v. MOORADIAN. 207 Pac. (2d) 579.

California Dist. Ct. App., 2nd Dist., June 21, 1949. Vallee, J.

Affirming a judgment regarding the persons entitled to share in an award made by the American-Mexican Claims Commission established under the Act of 1942 (56 Stat. 1058), as amended (59 Stat. 50), to "The heirs of Jose Francisco Arguello as their interests may appear" on account of depriva-

tion of use of land in Mexico, the court held that the California courts were not prevented by the award from determining the parties entitled to share therein. The court said, in part:

Claims of citizens of the United States against foreign governments usually are determined by international law, not by municipal law. . . . Claims of citizens against foreign governments have ordinarily been submitted to commissioners or some tribunal of arbitration to determine their validity and amount. . . . Where a commission has been appointed to determine the amount and validity of claims pursuant to or as a result of a treaty, its decision is final and conclusive upon all matters within its jurisdiction and the scope of its authority whether of law or fact. . . . Ordinarily, the authority of the commission is limited to determining the amount and validity of claims as against the other government, and its decision is not conclusive as to the rights of different claimants among themselves. The ordinary judicial tribunals have jurisdiction of the adjustment of conflicting rights of different claimants after the amount and validity of the claim has been established by some other tribunal. . . .

Discussing cases such as *Comegys v. Vasse*, 1 Pet. 193 (1828); *Williams v. Heard*, 140 U. S. 529 (1891); and *Butler v. Goreley*, 146 U. S. 303 (1892), involving domestic claims commissions established pursuant to international settlement, as well as cases involving awards by mixed tribunals, the court concluded that:

the American Mexican Claims Commission did not have jurisdiction or authority to, and did not purport to, determine conflicting rights between American nationals to the fund awarded . . . ; that the decision and award is not res judicata as to such conflicting rights or as to ownership of the award; and that the court below had jurisdiction to adjudicate the conflicting claims of the parties to the award.

The court added:

Under treaty with Mexico and legislation enacted pursuant thereto, American nationals asserting ownership of land were given the right to make claim for land expropriated. . . . The claim for the loss by reason of the expropriation of the land was a right attached to the ownership of the property itself. *Comegys v. Vasse*, 1 Pet. 193. . . . It was personal property . . . an asset of the estate. In making the claim the administratrix represented whatever title Jose had in the land at the time of his death. The legal owners of the claim made by appellant were, of course, the heirs, but subject to the possession of the administratrix. . . .

Aliens—land ownership—unconstitutionality of Oregon Alien Land Law

KENJI NAMBA *v.* McCourt. 204 Pac. (2d) 569.

Oregon Supreme Court, March 29, 1949. Rossman, J.

The court reversed a declaratory decree of the circuit court which had held valid certain provisions of the Alien Land Law of Oregon. Sec. 61-101 of that law permits "all aliens eligible to citizenship" to acquire, own, convey and inherit real property in the same manner and to the same extent

as citizens. Sec. 61-102 provides that "other aliens" shall exercise such rights

in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

The Treaty of 1911 between the United States and Japan, 37 Stat. 1504, was held not sufficient to bring Japanese nationals in Oregon within Sec. 61-102, whatever might be the effect of the abrogation of this treaty in January, 1940. Since Japanese nationals are ineligible to citizenship in the United States, the total effect of the Alien Land Law is to prevent them, and practically only them, from exercising the rights of acquisition, ownership, etc., with respect to real property, that are enjoyed by American nationals and other aliens within the State of Oregon.

The court relied upon *Oyama v. California*, 332 U. S. 633, this JOURNAL, Vol. 42 (1948), p. 475, and *Takahashi v. Fish and Game Commission*, 334 U. S. 410, this JOURNAL, Vol. 42 (1948), p. 934, in reaching its decision, considering those decisions to have "overruled" *Terrace v. Thompson*, 263 U. S. 197 (1923), this JOURNAL, Vol. 18 (1924), p. 346, and the line of cases following it, insofar as they might be taken to express an approval by the Supreme Court of such legislation as the Alien Land Law.

Although we believe that *Oyama v. California*, supra, and *Torao Takahashi v. Fish and Game Commission*, supra, disapprove of the parts of *Terrace v. Thompson*, supra (and its companion decisions) concerning classification, we do not believe that either of them disapprove the portions of those opinions which held that state legislation upon the subject of alien land acquisition must conform to (1) the due process clause, (2) the equal protection clause, and (3) the Federal Government's superior powers over aliens and immigration. Accordingly, we deem ourselves bound by those parts. In fact, it is clear to us that the reasoning in the *Oyama* and the *Takahashi* decisions strengthened and amplified the parts of the *Terrace* decision to which we just referred. In short, we deem it our duty (1) to disregard the parts of the *Terrace* decision which concern classification and to follow the holdings in the *Oyama* and *Takahashi* decisions upon that subject; and (2) to hold that state legislation concerning the acquisition of land by aliens is subject to the due process clause, the equal protection clause, and to the superior powers of the Federal Government over aliens and immigration (whenever those powers are pertinent).

Seeking to explain the change in the attitude of the Supreme Court of the United States between the *Terrace* and *Oyama* cases, this court commented:

A quarter of a century has passed since the decisions in *Terrace v. Thompson*, supra, and its companion cases were announced. In that score and five years significant changes took place in our understand-

ing of constitutional law, in our governmental structure, in our relationship with other nations and their people, in the number of ineligible aliens within our borders, and in the attitude of the American citizen toward others who do not have his individual color, creed or racial background. Possibly we can make clearer what we have in mind by resorting to the following summary: (1) Congress' successive amendments of the Naturalization Act whereby Chinese and other national groups, which were previously barred from citizenship are now eligible thereto, have left the Japanese as virtually the only people to whom the Oregon Alien Land Law is applicable. (2) The number of ineligible aliens along the Pacific Coast is materially smaller today than it was in so recent a period as the beginning of the war. (3) The enactment of the Exclusion Act, which occurred after the Alien Land Laws were adopted in the three Pacific Coast states, stopped immigration from Japan. (4) Recent developments in constitutional law, which seek to realize the goal for which the equality clause aims, emphasize with increasing stress that no classification can be countenanced unless (a) it is based upon real and substantial differences which are relevant to the purpose which the act seeks to achieve, and (b) the purpose itself is a permissible one. (5) Classifications employed in the Naturalization Act cannot be blindly used by the states in their legislation. (6) The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed. (7) The implications that arise from the concept of One World bring home the realization that the rights and privileges of aliens within our borders are matters for the Federal Government, and not for the states. (8) Every alien lawfully within our borders, even though he is a non-declarant or an ineligible, must be afforded free access to the ordinary occupations in whatever community he abides. (9) When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55, subd. c, and see Article 56): "Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." 59 Stat. 1031, 1046.

Effect of nationalization decree of recognized Soviet Estonian Government

LAANE AND BALTSEER v. ESTONIAN STATE CARGO & PASSENGER SS. LINE.
[1949] 2 D. L. R. 641.

Canada, Supreme Court, Feb. 28, 1949. Rinfret, C. J. C.

This is an appeal taken by Laane and Baltser from the earlier judgment entered against them in *Estonian State Cargo and Passenger Line v. S.S. "Elise" and Messrs. Laane and Baltser*, [1948] 4 D. L. R. 247, this JOURNAL, Vol. 43 (1949), p. 816. The court reversed the earlier judgment, holding the Estonian confiscation decrees insufficient to confer upon the state shipping company title to the proceeds from the sale of the *Elise* in the hands of the court, relying especially upon the decision of the King's Bench in *A/S Tallinna Laevauhisus v. Tallinna Shipping Co.*, 79 Ll. L.

Rep. 245 (1946), affirmed in the Court of Appeal, 80 Ll. L. Rep. 99, this JOURNAL, Vol. 42 (1948), p. 947. The Chief Justice said:

The decrees relied on by it [the respondent] were declared illegal and unconstitutional by the English Court of Appeal in the *Tallinna* case. It may be doubted whether their language was sufficient to vest the "Elise" in the respondent. In the *Tallinna* case it was held that they lacked the necessary wording to make them effective in that respect; and, further, that they were incomplete in the sense that the last stage to give them force of law [the drawing up of a nationalization deed and transfer balance sheet] had not been proceeded with. At the material time the "Elise" was in the Port of Saint John, Canada, a foreign country. She was then in possession of the appellants and the respondent never got possession of the ship, nor any control of her, before the ship was sold by the Marshal. The proceedings herein were instituted after the sale and were not directed against the ship herself, but against the proceeds of the sale, then deposited in a Canadian Admiralty Court.

Moreover, the decrees are of an evident confiscatory nature [they had provided for compensation at 25% of the valuation] and, even if they purport to have extra-territorial effect, they cannot be recognized by a foreign country, under the well-established principles of international law. Quite independent of their illegality and unconstitutionality, they are not of such a character that they could be recognized in a British Court of Law.

Although the court was unanimous in its decision, four separate opinions were written to sustain it. Kerwin, J., whose opinion was concurred in by Estey, J., emphasized the confiscatory and "penal" nature of the decrees, and mentioned the location of the ship outside the territory of Estonia at the time the decrees were promulgated. Similar was the opinion of Kellock, J. Rand, J., considered the decrees to partake of the nature of "revenue" as well as of "penal" laws, and therefore to be doubly unenforceable; most important to him was the violation of the public policy of Canada which would be involved in giving effect to the decrees:

The acquisition of property here is not to be dissociated from the larger political policy of which it is in reality an incident. The matters before us evidence the fundamental change effected in the constitution of the Estonian state, of which that acquisition is only one, though an important, particular. What has been set up is a social organization in which the dominant position of the individual, as recognized in our polity, has been repudiated and in which the institution of private property, so far as that has to do with producing goods and services, has been abolished; and those functions, together with the existing means, taken over by the state.

What is asked of the foreign territorial law is, therefore, to aid in the execution of a fundamental political law of Estonia which serves no interest of the foreign state. . . . If the transfer of property by such a law of Estonia has been satisfied by the condition of territorial jurisdiction, the title will be recognized and enforced, as in England

the similar Decrees of Russia: *Luther v. Sagor & Co.*, [1921] 3 K. B. 532. But where that legislative basis is absent there is no warrant in international accommodation to call upon another state to exercise its sovereign power to supply the jurisdictional deficiency in completing such a political program. . . .

Jurisdiction—contiguous waters outside territorial waters—smuggling
ATTORNEY-GENERAL v. HUNTER. [1949] 1 All Eng. L. R. 1006.

England, High Court, King's Bench Div., March 24, 1949. Morris, J.

The court held forfeited the motor vessel *Taku*, which had engaged in a project for smuggling liquor into Great Britain, although transshipping its cargo beyond territorial waters to other craft which landed it. After such transshipment, the *Taku* developed engine trouble and put into Portsmouth for repairs, where it was seized. The vessel was apparently of British registry, although this is not clear from the record, but was owned by an American. Applicable sections of the Customs Consolidation Act of 1876 include Sec. 179, which reads in part:

If any ship or boat shall be found or discovered to have been within any port, bay, harbour, river, or creek of the United Kingdom or the Channel Islands, or within three leagues of the coast thereof if belonging wholly or in part to British subjects, . . . or within one league if not British, having . . . or having had on board . . . or conveying or having conveyed in any manner any spirits . . . which . . . are prohibited to be imported into the United Kingdom . . . every such ship or boat . . . shall be forfeited. . . .

The vessel was also subject to forfeiture under Sec. 170 and regulations issued under Sec. 169, which prohibit vessels under forty tons from going beyond twelve leagues seaward from the English coast save under special license. It was held that this last section applied to vessels owned by a person not a British subject, and that the *Taku* was liable to a forfeiture on this ground.

Defendant claimed that if transshipment occurred more than one league from the British coast, Sec. 179 was inapplicable. The court said:

It is said by counsel that . . . the words in the section "having had on board" are not referable to a case where a ship comes within territorial waters without prohibited goods on board but has had them outside the limit, but only refer to a case where a vessel comes within the one league with the prohibited goods and then is either found with the goods on board or within the distance of one league having had the prohibited goods on board within one league. Counsel also said that, in any event, when the *Taku* put into Portsmouth she did not come in as part of the voyage in the course of which the liquor had been transhipped, his ground for that contention being that the defendant said that the *Taku* had set course for Le Havre and had then changed course. In my judgment, that is not a valid contention. Even assuming that the *Taku* did start for Le Havre, this was clearly the same

voyage. Then counsel said that when the Taku, outside the limit of the league from shore was transshipping the liquor, she was not dealing with prohibited goods. In my judgment, one must look at the whole of the facts and one must have in mind that this was a planned adventure and that it was one part of the plan that at a particular point these goods intended to be landed on the English coast without paying duty shall be transhipped. In my judgment, that contention of counsel is not a valid one.

In reaching its conclusion, the court referred to *Attorney-General v. Schiers*, 2 Cr. M. & R. 286 (1835).

Immunity—property of international agency—Tripartite Gold Commission

DOLLEUS MIEG ET CIE. S. A. v. BANK OF ENGLAND. [1949] 1 All Eng. L. R. 946.

England, High Court, Chancery Div., April 6, 1949. Jenkins, J.

The Bank of England was held immune to suit in its capacity as bailee of certain gold bars deposited with it by the Tripartite Gold Commission. The gold had been seized from plaintiff French company by the Germans and subsequently recovered by Allied occupation forces in Germany. The Commission, unaware at the time of the plaintiff's ownership, had declared it "monetary gold" and had taken possession of it as authorized by the Paris Agreement on Reparation from Germany, etc., signed by eighteen Allied Powers on January 14, 1946. The Commission is composed of representatives of the United States, France, and Great Britain. That the Crown Proceedings Act of 1947 permits suit against the British Government was held of no aid to the plaintiff, for, since recovery against the Bank would be a good defense when it was requested to pay over the gold by the Commission, and since the Commission acted only for the states represented on it, to permit suit against the Bank in this instance would be equivalent to permitting suit against the United States and France in a British court.

Sovereign immunity—agency of foreign government—"Tass"

KRAJINA v. THE TASS AGENCY. [1949] 2 All Eng. L. R. 274.

England, Court of Appeal, June 27, 1949. Cohen, L. J.

This was an appeal from an order setting aside service on the British branch of Tass Agency, in a suit for damages for libel. The court affirmed the dismissal, on the grounds that Tass is an agency of the Soviet Government and entitled to sovereign immunity, despite the provisions of Soviet law that the agency should enjoy all the rights of a juridical person.

All the justices lamented the lack of evidence presented, basing their decisions principally upon the certification of the Soviet Ambassador that:

The telegraph agency of the Union of Soviet Socialist Republics, commonly known as Tass, or the Tass Agency, constitutes a department of the Soviet State, i.e., the Union of Soviet Socialist Republics, exercising the rights of a legal entity.

The translation of the Soviet statute establishing Tass, also in evidence, provides that: "The telegraphic agency of the U.S.S.R. and the telegraphic agencies of the Union Republics enjoy all the rights of a juridical person." Unfortunately, however, no evidence was adduced as to the meaning to be imputed to the terms "legal entity" and "juridical person" in Soviet law.

The primary opinion, that of Cohen, L. J., concludes:

the evidence falls far short of that which would be necessary to establish that Tass is a legal entity and that the Union of Soviet Socialist Republics, by procuring its incorporation, has deprived that particular department of the immunity which normally attaches to a department of a sovereign State in accordance with the principles of comity established by international law and recognized by this country.

Even if Tass had the status of a separate juridical entity, he said:

It does not seem to me necessary to follow that it would thereby have been deprived of its immunity.

Discussing a number of American cases distinguishing the government corporation from the government itself in questions of immunity, he continued:

The inference I should draw from these American cases is (and to this extent I do not think I should quarrel with it) that a sovereign government may so incorporate a particular department of State as to make it plain that it is to be an ordinary trading, commercial, or business activity and not to be part of the State so that it can claim immunity, but I think it would be wrong to infer from these authorities, and I should not, without further argument, be prepared to accept the view, that it necessarily followed that, because a department of State was granted incorporation, it was deprived thereby of the right to assert its sovereign immunity in foreign courts. I need not say anything more on that aspect of the question in view of the conclusion which I have reached on the main point, that the evidence does not satisfy me in this case that Tass was a separate legal entity.

Tucker and Singleton, L. JJ., agreed.

Nationality laws—France

HANAU. 37 Rev. Critique de Droit Int. Privé (1948); p. 473.

France, Cour de Cassation (Chambre Civile), Nov. 4, 1947.

The court affirmed the denial of a request for the resumption of French nationality under the provisions of the Treaty of Versailles. The action had been based upon descent from one Judith Israël born in Moselle in 1820 and become "*soi-disant*" German through the effect of the Treaty of

Frankfort of May 10, 1871. It was apparently considered that they could so claim, however, had Judith not lost her French nationality by marrying Moïse Hanau in 1844. Whether Moïse was a French national depended upon whether his father, Marx, had lost his nationality by being domiciled in Beaumaraais when that region was ceded to Prussia by the Treaty of Paris of November 20, 1815. Regarding this last point, the claim was made that although the Treaty of Paris of 1815 reserved to the inhabitants of the ceded territory only the right to emigrate, the law of October 14, 1814, interpreting the first Treaty of Paris (1814), which took away French nationality only from those who had been born in the territory and had acquired their French nationality solely by the juncture of that territory to France after 1791, should be applied to Marx, so as to preserve his French nationality, and thus that of his descendants.

The court held, however, that:

in the absence in the Treaty of 1815 of any provision relative to the nationality of the inhabitants of the ceded territory, and according to the terms of Articles 13 and 14 of the . . . 1945 . . . Nationality Code, which are applicable to prior diplomatic acts bearing on the cession of territory, persons such as Marx Hanau, domiciled in these regions, have lost French nationality, unless they effectively established their domiciles outside them, which condition he did not fulfill.

Treaties—effect as domestic law—in France

LAMBERT *c.* JOURDAN. 37 Rev. Critique de Droit Int. Privé (1948), p. 493.*

France, Cour d' Appel de Paris, Jan. 30, 1948.

THE COURT:

Deciding an appeal instituted by Mr. and Mrs. Lambert from an order rendered between them and Mr. Jourdan, February 21, 1945, by the President of the Civil Tribunal of the Seine, such order rejecting the claim of Mrs. Lambert, née Goldsmith, for repossession filed in application of the ordinance of November 14, 1944;

Considering that to justify this decision . . . there is occasion, in consequence, for invalidating the decision attacked and affirming the request for repossession which is before the Court;

Considering, with respect to subsidiary conclusions, that the ordinance of November 14, 1944, is applicable without distinction of nationality to tenants fulfilling the conditions required by its text, with the exception, as is made clear by the cases, of nationals of enemy countries;

Considering that, as the law of May 7, 1946, has limited, with regard to certain foreign nationals, the effects of the ordinance of November 14, 1944, it is proper to determine whether, apart from foreign nationals who fought

* Full report translated.

on the side of France, all foreigners who have been affected by an order of eviction can invoke the law of May 7, 1946;

Considering, in the first place, that the law of May 28, 1943, relative to the application to foreigners of the laws concerning urban and rural leases, clearly indicates in its first article, that notwithstanding any restrictive provisions, laws affirming or making exception to the ordinary law relative to the leases in question reserve necessarily the case of foreign nationals of countries which offer to Frenchmen the advantages of a legislation similar to that applicable to foreign nationals exempted by international convention from the requirement of reciprocity, and such laws of ours are, consequently, applicable to foreigners;

Considering that Article 2 of that text adds that diplomatic conventions which result, directly or indirectly, in the assimilation of the foreigner to the national in the domain of civil rights, or at least in that part governed by the law the application of which is claimed, dispense with the legislative reciprocity provided for by Article 1;

Considering that if it is believed it should be admitted that the provisions of a general nature of the law of May 28, 1943, domestic legislation limiting the competence of the French judge, ought to give way to the more precise provisions of a later text such as the law of May 7, 1946, it should not be forgotten that, after that latter date, the Constitution of the Republic of France was promulgated on October 27, 1946, and that a constitutional law prevails over ordinary laws;

Therefore, considering that by the terms of Article 26 of that Constitution, diplomatic treaties regularly ratified and published have the force of law, even where they may be contrary to French domestic law, without there being necessary to ensure their application any other legislative provisions than those necessary to assure the ratification of the treaties; that Article 28 of the same Constitution adds that diplomatic treaties, regularly ratified and published, having an authority superior to that of domestic law, their provisions cannot be changed, modified, or suspended except by a regular denunciation, notified through diplomatic channels, it being necessary, further, for certain treaties that the denunciation be authorized by the National Assembly;

Considering that these provisions undoubtedly contemplate not only treaties which may be made after the promulgation of the Constitution, but also those already in force and not denounced, and of which the denunciation, in addition, can take place only in conformity with the Constitution; that further, prior to the Constitution of October 27, 1946, and as was noted in a report of April 14, 1933, made to the President of the Republic, with respect to the law of April 1, 1926, relative to non-commercial leases, which had excluded from its provisions foreigners not having fought in the French army, it could not suffice to avoid the execution of international obligations to declare that such-and-such a legal or regulatory provision is ex-

ceptional and outside the ordinary law, that it could not be foreseen at the time when the obligations were contracted, and that for these reasons it was reserved exclusively to nationals; that in the contrary case, there could no longer be, added the report, any security in engagements of the Powers, treaties then depending on the unilateral good will of each of the contracting parties and thus no longer offering any guaranty;

[Considering] that it is proper to recall that after this report a decree of April 16, 1933, passed in consequence of Article 8 of the Convention of July 16, 1875, approved an accord between France and Spain, an agreement which had only an interpretative character, as well as one concluded under the same conditions with the United States, with reference to the same law, and approved by a decree of May 9, 1933;

Considering that the special authority which is attached to international treaties is found so much more strongly affirmed now that the new Constitution has proclaimed it formally, that it is not necessary, consequently, upon the basis of retroactivity, to ask whether insofar as the Constitution could limit the powers of the legislator, it could do so only with respect to subsequent legislators; and also that, with respect to contradictions which may exist between two ordinary laws equally in force, such as those of May 28, 1943, and of May 7, 1946, it is sufficient, in order to resolve the difficulties of interpretation which result from this, to refer to the principles established by the Constitution; that it is, consequently, important only to determine in each instance where the ordinance of November 14, 1944, ought to be applied, whether the rights that a foreign national not belonging to an enemy country can have, arise from treaties binding his country and France, treaties that an ordinary law can neither modify nor denounce, or from a domestic French law which reinforces the framework of the treaty;

Considering, from this point of view, that Article 7 of the Convention concluded February 23, 1853, between France and the United States, clearly states that the French Government accords to citizens of the United States the right to enjoy in France, in matters of property, movable or immovable, and of succession, treatment identical with that which is enjoyed in France, in like matters, by French citizens; that the right of a tenant to his lease is already included in the provisions of Article 7; that, in addition, the application of the law of May 28, 1943, concerning urban leases, although earlier than that of May 7, 1946, should not be dispensed with after the promulgation of the Constitution, and, consequently, that it is still a question of a foreign national fulfilling the conditions necessary to take advantage of it; that, in particular, an American citizen can be regarded as assimilated to a Frenchman in the domain of French civil rights;

Considering, consequently, that Mr. Jourdan is not in a position to claim the benefit of the law of May 7, 1946;

For these reasons, . . .

Invalidates the order given and by a new decision orders the restoration to the woman Goldsmith of the apartment of which she is the tenant, 38 Avenue Hoche, and

Orders the eviction of Jourdan from that apartment, as well as any occupant under him.

Nationality—status of German Jewish refugees

FRETEL *c.* WERTHEIMER. 38 Rev. Critique de Droit Int. Privé (1949), p. 65.

France, Cour de Cassation, March 13, 1948.

For purposes of the application of French law to German Jewish refugees, under the provisions of the Declaration of London of January 5, 1943, one Wertheimer was held an "enemy national" and thus not within the class protected by the Declaration, although he had been an Austrian national before the Anschluss.

[*Note:* Also dealing with the status in France of German Jewish refugees, see *Chipart c. Stern*, 38 Revue Critique 66 (Cour de Cassation, July 30, 1948); *Lennhof c. Brach*, *ibid.*, p. 67 (Cour d'Appel de Colmar, July 21, 1948); and *Epoux Buisson c. Vve. Moses et al.*, *ibid.* p. 70 (Cour d'Appel de Paris, July 23, 1948).]

Treaties—interpretation—subsequent exchange of notes

BECKER *c.* PREFET DE LA MOSELLE. 38 Rev. Critique de Droit Int. Privé (1949), p. 55.

France, Tribunal de Sarreguemines, June 22, 1948.

Becker sought French nationality on the basis of the Treaty of Versailles, which provided that such nationality would be granted to those who had lost their nationality through the application of the Franco-German Treaty of May 10, 1871, and to their descendants; he met this qualification through his maternal line. It was objected, however, that the provisions referred to specifically excluded those "having among their ancestors in the paternal line a German who immigrated to Alsace-Lorraine after July 15, 1870." He pointed out that his father had not immigrated to Alsace-Lorraine, but had remained in Germany, and that a long line of cases had held that such treaty provisions as this exception must be narrowly construed, and especially that the Court of Cassation, on November 9, 1925, had specifically denied that *this* provision would, *a fortiori*, apply to people in his circumstances.

The court, however, rejected his argument, saying that since that decision, the interpretation of the provision referred to had been

fixed expressly and without equivocation by notes exchanged, March 6, 1939, between the Minister for Foreign Affairs and the German Ambassador in Paris, to the effect that:

"The exception contemplated by that provision and which excludes from reinstatement the legitimate or natural descendants of persons mentioned in Par. 1 when they have among their ancestors in the paternal line a German who immigrated to Alsace-Lorraine after July 15, 1870, extends *a fortiori* to those who have among their ancestors a German who did not immigrate to Alsace-Lorraine."

Thus, even in the absence of any ratification by the Chambers giving the above accord the force of law, the intention of the high contracting parties . . . is found henceforth clearly established.

Treaties—interpretation—rights under French law on rural leases

BRAUN *c.* THUREAU; POINSOT *c.* KURICA; MARCO *c.* FABRESSE. 38 Rev.

Critique de Droit Int. Privé (1949), pp. 306-311.

France, Cour de Cassation, July 28 and Nov. 25, 1948.

The question in three cases before the Court of Cassation was the right of nationals of various states to take advantage of the provisions of the ordinance of October 17, 1945, relating to rural leases, which right was restricted to French nationals by the terms of Article 61 of the ordinance. In *Poinsot c. Kurica*, *loc. cit.*, p. 308, the court held a Polish national possessed of such a right under the Franco-Polish Treaty of May 22, 1937, which granted the Poles "most-favored-nation treatment in matters concerning the right to possess, acquire, occupy, or rent all property movable or immovable," because of the provisions of the additional articles of April 9, 1910, to the Franco-Danish Treaty of Feb. 9, 1842, giving Danes the rights of French nationals ("*assimilant les Danois aux Français*" is the language used by the court).

In *Braun c. Thureau*, *loc. cit.*, p. 307, decided four months earlier, the court had held a Swiss national entitled to invoke the provisions of the ordinance under the Franco-Swiss Commercial Treaty of Feb. 23, 1882, which provided in Art. 6 that:

Any advantage which one of the contracting parties should have conceded or should hereafter concede in any manner whatever to another power in matters concerning the establishment of citizens and the carrying on of industry by them, shall be applicable in the same manner and at the same time to the other party, without it being necessary to conclude a special agreement to that effect.

The court in this earlier case did not specifically state upon what concession to another power the right of the Swiss citizen was based.

In *Marco c. Fabresse*, *loc. cit.*, p. 308, decided the same day as the *Poinsot* case, the right was refused; the treaty in that case, the Franco-Spanish Consular Convention of January 7, 1862, provided for certain enumerated rights, including those "to acquire and possess all types of property movable and immovable . . . , to rent houses, warehouses, and shops which may be necessary to them." This text, said the court, does not contemplate the extension of rights to rural leases, but by its enumeration of certain rights excludes those not so enumerated.

Military occupation—payments and bank deposits in occupation currency

VICENTE HILADO.*

Republic of the Philippines, Supreme Court, April 30, 1949. Feria, J.

Plaintiff, a depositor in defendant bank prior to and during the Japanese occupation of the Philippines, claimed he was entitled to his entire credit balance in said bank, and sought declaratory relief to test the constitutionality of Executive Order No. 49, which provided: first, that all deposits made with banking institutions during enemy occupation were null and void; and second, that all withdrawals during enemy occupation from balances standing as of the last date prior to enemy occupation were valid and banking institutions were to be liable only for the lowest minimum balance remaining out of such balance to the depositor on the last date prior to the occupation.

In reversing a decision of the lower court holding unconstitutional that part of the Executive Order which reduced plaintiff's credit to the lowest minimum balance, the court said:

. . . the provisions of Executive Order No. 49, do not deprive the plaintiff of his property without due process of law or impair the obligation of contract entered into between him and defendant bank; because they are but the logical corollary and application to bank deposits in Japanese war notes of Executive Order No. 25 in so far as it declares that said notes are not legal tender in territories of the Philippines liberated from Japanese occupation. . . .

The court, citing *Haw Pia v. China Banking Corporation*, G. R. No. L-554, this JOURNAL, Vol 43 (1949), p. 821, and *Luis Araneta v. Philippine Trust Co.*, G. R. No. L-2734, added:

. . . a payment made by a debtor during the enemy occupation of a prewar debt or obligation with Japanese war notes and accepted by the creditor, is valid and extinguishes the former's obligation. But a deposit subsequently made by a depositor in a bank can not be considered as a payment of a debt due from the depositor to the bank, but an additional credit opened by said deposit in favor of the depositor and against the bank, and the liability of the latter for the payment of said credit upon demand after liberation has to be determined in accordance with the domestic law or rule of international law applicable to the case; . . . the Japanese military occupant had the right to issue war notes as currency and order that they may be used in making payment of all kinds, due to military necessity. But such an order, being of political character, fell through as of course upon the cessation of the Japanese Military occupation; because it is a well-established rule in international law that "the law made by the occupant within his admitted power, whether morally justifiable or not, will bind any member of the occupied population as against any other member of it, and will bind as between them all and their national government, so far as it produces an effect during the occu-

* Ms. opinion supplied by Dr. Martin Domke.

pation. When the occupation comes to an end and the authority of the national government is restored, either by the progress of operations during the war or by the conclusion of a peace, no redress can be had for what has been actually carried out but nothing further can follow from the occupant's legislation." (Westlake, *International Law*, seventh edition, p. 518. . . .)

The court then decided that since under the laws of that jurisdiction a bank deposit was a commercial deposit, it would be absurd to say that deposits made in Japanese war notes were to be regarded as identical in kind and value with Philippine currency, particularly in view of the fact that after liberation such notes had no real value. The court said that such deposits

. . . should not be understood to be a general deposit without specification of currency, that is, a deposit of lawful money of the legitimate government, and it will have the same effect as if it were made with money that was legal tender or currency of a foreign country having no monetary treaty or agreement with the legitimate government; and therefore if such currency becomes valueless, the depositor shall have to suffer the loss, because the currency so deposited is exactly of the same condition and validity as that kept in the pockets or safe of the depositor.

Therefore, while it does not expressly appear that plaintiff's deposit in Japanese war notes were made with a specification of the currency deposited, the minimum requirements of justice demand that said deposits should be considered as made with an implied specification of currency. . . .

CASES NOT DIGESTED

Aliens—deportation:

U. S. ex rel. Walther v. District Director, 175 F. (2d) 693 (Ct. App. 2d, June 20, 1949).

Klig v. Watkins, 84 F. Supp. 486 (S. D. N. Y., Oct. 20, 1948).

Tung Shing v. Zimmerman, 85 F. Supp. 270 (E. D. Pa., Aug. 11, 1949).

Re Robinson, [1949] 1 D. L. R. 115 (Ont. High Ct., May 5, 1948).

Aliens—exclusion:

U. S. ex rel. Bartsch v. Watkins, 175 F. (2d) 245 (Ct. App. 2d, May 27, 1949).

U. S. ex rel. Chu Leung v. Shaughnessy, 83 F. Supp. 925 (S. D. N. Y., April 27, 1949).

Van Laeken v. Wixon, 84 F. Supp. 958 (N. D. Calif., June 3, 1949).

Aliens—immoral purpose, bringing in for:

Dalton v. Hunter, 174 F. (2d) 633 (Ct. App. 10th, May 10, 1949).

Aliens—inheritance, right in absence of treaty:

Estate of Bevilacqua, 31 Calif. (2d) 580 (March 31, 1948).

Aliens—suits in forma pauperis:

U. S. v. Sevilla, 174 F. (2d) 879 (Ct. App. 2d, May 26, 1949).

Lauricella v. U. S., 84 F. Supp. 361 (S. D. N. Y., Oct. 15, 1948).

Enemy aliens—removal:

U. S. ex rel. Hoehn v. Shaughnessy, 175 F. (2d) 116 (Ct. App. 2d, June 7, 1949).

U. S. ex rel. Aigner v. Shaughnessy, 175 F. (2d) 211 (Ct. App. 2d, June 16, 1949).

U. S. ex rel. Engelbert v. Watkins, 84 F. Supp. 409 (S. D. N. Y., Sept. 23, 1946).

Expatriation:

Clark v. Inouye, 175 F. (2d) 740 (Ct. App. 9th, June 23, 1949).

Extraterritorial jurisdiction—decree of U. S. Court for China—informal modification:

Jameson v. Jameson, 176 F. (2d) 58 (Ct. App., D. C., June 13, 1949).

Foreign state plaintiff—meaning of “foreign state” for diversity jurisdiction:

République Française v. M. K. & T. Ry., 85 F. Supp. 295 (N. D. Tex., July 29, 1949).

Foreign state plaintiff—unsuccessful action for taxes due:

Republic of Costa Rica v. Hamilton Bros., 1949 A. M. C. 1589 (Fla., Circ. Ct., 13th Circ., May 2, 1949).

Immunity from suit:

Matthews v. Walton Rice Mill, 176 F. (2d) 69 (Ct. App., D. C., July 5, 1949).

Jurisdiction—law governing wage dispute on foreign merchant vessel in port:

Korthinos v. Niarchos, 175 F. (2d) 730 (Ct. App. 4th, May 17, 1949).

Jurisdiction—law governing merchant vessel on high seas:

Taylor v. Atlantic Maritime Co., 1949 A. M. C. 1192 (S. D. N. Y., June 7, 1949).

Naturalization—cancellation:

Brenai v. U. S., 175 F. (2d) 90 (Ct. App. 1st, June 1, 1949).

U. S. v. Geisler, 174 F. (2d) 992 (Ct. App. 7th, June 9, 1949).

Bechtel v. U. S., 176 F. (2d) 741 (Ct. App. 9th, Aug. 5, 1949).

U. S. v. Jay, 84 F. Supp. 546 (N. D. Ind., Jan. 13, 1948).

U. S. v. Alden, 84 F. Supp. 522 (S. D. N. Y., June 10, 1949).

Naturalization—cancellation—effect on child's derivative naturalization:

Sanders v. Clark, 85 F. Supp. 253 (E. D. Pa., Aug. 9, 1949).

Naturalization—continuance until deportation decided:

Petition of Warhol, 84 F. Supp. 543 (D. Minn., May 13, 1949).

Naturalization—denied former Nazi:

In re Molsen, 84 F. Supp. 515 (N. D. Tex., June 25, 1949).

Naturalization—procedure:

Gin v. U. S., 175 F. (2d) 299 (Ct. App. 7th, June 9, 1949).

Patents—territorial scope:

Specialties Development Corp. v. C-O-Two Fire Equipment Co., 85 F. Supp. 656 (D. N. J., May 16, 1949).

Treaties—effect of war on provision for inheritance:

Estate of Knutzen, 31 Calif. (2d) 573 (March 31, 1948).

War—enemy property and Alien Property Custodian:

Clark v. E. J. Lavino & Co., 175 F. (2d) 897 (Ct. App. 3d, June 1, 1949).

Heyden Chem. Corp. v. Clark, 85 F. Supp. 949 (S. D. N. Y., Oct. 23, 1948).

Von Wedel v. Clark, 84 F. Supp. 299 (D. N. J., June 1, 1949).

Sun Ins. Office, Ltd. v. The Arauca, 84 F. Supp. 516 (S. D. Fla., June 7, 1949).

Shinsaku Nagano v. Clark, 84 F. Supp. 828 (N. D. Ill., June 7, 1949).

McCloskey v. Bache, 88 N. Y. S. (2d) 196 (Spec. Term, N. Y. Co., March 22, 1949).

BOOK REVIEWS AND NOTES

Sovetskoe Gosudarstvo i Mezhdunarodnoe Pravo 1917-1947 (OPYT Istoriiko-Pravovogo Issledovaniya) [The Soviet State and International Law 1917-1947 (An Attempt at Historical-Legal Research)]. By F. I. Kozhevnikov. Moscow: 1948. pp. 376. 15 rubles.

Professor Kozhevnikov dates his introduction "1 May 1948" and thus indicates that his newest book antedates the sharp criticism leveled at his 1947 book by his colleague, Professor Korovin.¹ Nevertheless the volume reflects the general spirit which had been in the air ever since Andrei Zhdanov's well-known criticism of the philosophers. Kozhevnikov writes with marked patriotism for the U.S.S.R. and socialism, even to the point of expressing the U.S.S.R.'s preference for the Russian language for its treaties, as a language which Lomonosov long ago hailed "as not alone the equal of other languages but even surpassing many of them."

Those institutions of international law which can facilitate the execution of Soviet policy are recognized and applied in the U.S.S.R., writes Kozhevnikov, while those that conflict with the policies in any degree are rejected. The U.S.S.R.'s general policy is stated to be the preservation of peace so as to permit the building of Communism domestically. Stalin's speech of 1939 is quoted to the effect that Communism is deemed to be possible of achievement in one country even if the rest of the world does not move forward at the same speed. Soviet relations with the new "People's Democracies" are found to be creating a new socialist international law.

The book's arrangement differs from the 1947 volume, and the text is largely rewritten, except for the retention of certain definitions. The chapter headings reflect current Soviet interests: Subjects of International law, the Principle of Sovereign Equality, the Doctrine of Non-Intervention, Population, Territory, International Obligations, Legal Forms of the Organization of Foreign Relations, Inter-State Organizations, Peaceful Means of Settling Disputes, Humanization of the Laws and Customs of War and the Struggle Against Aggression.

Much material is included from the work of the United Nations and the drafting of the peace treaties. Extensive footnotes improve the book over earlier efforts. Some problems such as "secret treaties" may seem to be insufficiently discussed. Kozhevnikov declares that he must emphasize that the conclusion of secret treaties under certain conditions does not conflict with the basic principles of Soviet foreign policy. Secret

¹ See this JOURNAL, Vol. 43 (1949), p. 387.

treaties do not mean secret diplomacy, he explains, for that is participation in international combinations behind the back of the people and counter to its interests. Secret diplomacy does not arise from secret treaties, particularly when there is a presumption that they will be published, once the reason for secrecy has passed. Article 102 of the Charter of the United Nations is subsequently set forth with reference to the rules adopted to implement it. One might wish for explanation of the relation between Article 102 and secret treaties, instead of leaving the reader to draw his own conclusion, as for example, that there might be no need to call upon an agency of the United Nations for aid in enforcement.

Kozhevnikov criticizes Professor Korovin for stating years ago that the U.S.S.R. was opposed to arbitration. He finds the record proves the contrary, although it indicates Soviet preference for prior diplomatic negotiations and arbitration without a neutral super-arbiter. He finds the International Court of Justice accorded full respect, but that the U.S.S.R. resists any effort to extend the court's jurisdiction, as when a proposal was made that it be empowered to interpret the peace treaties.

Contemporary developments in international law are considered, especially the Nuremberg principles. Kozhevnikov hails particularly the establishment of crimes against humanity and personal responsibility for aggressive war. He finds that in spite of shortcomings pointed out by the Soviet judge, the Nuremberg Judgment is "the first example of real accomplishment of international justice over war criminals."

JOHN N. HAZARD

Estudios de Política Internacional y Derecho de Gentes. By Camilo Barcia Trelles. Madrid: Instituto Francisco de Vitoria, 1948. pp. 585.

The large volume under review is a collection of articles by the author, previously published in different reviews between 1943 and 1948. Whereas the Italian School of International Law strictly distinguishes between international law and international politics, Barcia Trelles here, as always, considers problems of international law in the light of international politics. The very title of the book is significant; and, indeed, as the author himself states, the studies dedicated to the analysis of problems of international politics predominate.

As to their subjects, the articles deal with three great problems which have fascinated the author during his whole career. First, the preponderant rôle of the high seas in world politics, an idea at least as old as Thucydides; second, the foreign policy of the United States and problems of Hispanic America, problems with which the author is also well acquainted by his frequent visits to this continent. Studying the Latin American "doctrine of non-intervention," he speaks as a Spaniard, as a son of the mother country and reminds Latin Americans that independence can-

not create an historical vacuum, that their history has been for three hundred years a part of the history of Spain, and that what is prominent in Hispanic-American genius must be and can only be found in the history of Spain. The author studies in great detail the experience of Canada, and the origin and development of American isolationism.

Third, there is the problem of international organization. Many studies deal with the United Nations Charter and the attitude of the United States toward the United Nations. No one will be astonished to learn that the Spanish author is deeply antagonistic to Soviet "cosmocracy"; he blames what he calls President Roosevelt's "appeasement" of Stalin and highly praises the doctrine of containing Communism of President Truman, who is to the author "a cosmocrat in the highest sense of the word." Naturally, the weaknesses of the United Nations, of the veto, are strongly emphasized; the exclusion of the present Spain from the United Nations is commented upon at length. Comparisons with the Covenant of the League of Nations are frequent.

While international politics prevail in Barcia Trelles' approach, let no one suppose that he belongs to the now so fashionable "realistic" school of power politics. Quite to the contrary; he studies international politics not apart from ethical and moral considerations; he is "looking for the subterranean lines which permit one to value present events as the symbol of the regression of the post-war world." He acknowledges the present world crisis and the decline of Europe, but prophesies that salvation, if there is to be a salvation, must come from this old Christian Europe, which, however mistreated and impoverished, still has enough spiritual richness to show the world the way which leads to the light. He opposes Macchiavelli and power politics; contrary to most writers, he condemns the Peace of Westphalia as the beginning of the road which has led us to where we are. To Macchiavelli, power politics, Westphalian Peace and to the development stemming from it, to all these politics of "mere circumstantialism," he opposes—always a Spaniard—the doctrines of the "glorious Dominican, Fray Francisco de Vitoria."

JOSEF L. KUNZ

Allgemeine Lehren des Staatsangehörigkeitsrechts. By A. N. Makarov. Stuttgart: W. Kohlhammer, 1947. pp. 397. Index. RM. 21.00.

After teaching public and international law in Tzarist and Soviet Russia for more than a decade, Alexander Nicolayevich Makarov left his native country in 1925. For the next twenty years, until the collapse of the Hitler régime, he served as a *Referent* on the staff of the famous Kaiser Wilhelm Institute for Foreign and International Law, and became widely known as an expert in nationality law.

In the book under discussion Makarov deals with those general legal problems of nationality that, he believes, lie at the core of any concrete

norms pertaining to the acquisition and the loss of nationality. Limiting his treatise to natural persons, the author takes up in turn the concept of nationality, the sources of nationality law, the legal nature of nationality, the legal order relevant for determining nationality, the application of nationality law, the accumulation of nationalities (and its counterpart, statelessness), and the proof of nationality.

Makarov advocates a nationality concept that combines both the legal relationship and status concepts. Moreover, he holds that individual rights and duties play no part in determining nationality; rather that it is to nationality that the legal order attaches such rights and duties at its discretion. The sources from which the rules pertaining to nationality are derived are national and international law. Within the broad limitations of international law each state is competent to lay down its own rules of nationality. These limitations are, on the one hand, that no state may interfere with the nationality regulations of any other state, and, on the other, that no state may force its nationality on persons that are in no way connected with its legal order, nor may it deny altogether its nationality to the inhabitants of a territory ceded to it. As to their legal nature the rules of nationality belong to the field of public, rather than private, law, even when they are included in civil codes. With two exceptions the question whether or not a person possesses a certain nationality must be decided according to the legal order of the state whose nationality is at issue. The exceptions arise when, by applying that legal order, the state would have to violate its *ordre public* or have to sanction any action *in fraudem legis*. Also all preliminary questions relevant to nationality (such as filiation, legitimation, marriage, majority) are to be decided according to that legal order. With respect to nationality accumulation, two types of cases are distinguished. If one of the nationalities is that of the *lex fori*, it prevails. If, however, all nationalities are foreign, the "effective" nationality, that is, the one which according to the specific circumstances links the person most strongly with a state, is recognized. The proof of a specific nationality should be established according to the rules of the *lex causae*, unless that puts the courts or the administrative agencies which seek to ascertain the nationality in a less favorable position than the courts and administrative agencies of the foreign legal order in question, in which case proof is established according to the rules of the *lex fori*.

This survey touches only the author's main conclusions, for which he draws on a wealth of materials (laws, treaties, judicial decisions, legal literature)—predominantly from continental Europe, however. His book is a systematic, scholarly treatise *de lege lata* (in good German tradition one half of the book consists of footnotes) with hardly any suggestions *de lege ferenda*.

GEORGE V. WOLFE

La Prise d'Otages. By C. M. O. Van Nispen tot Sevenaer. The Hague: Martinus Nijhoff, 1949. pp. x, 159. Index. Fl. Holl. 6.

This book has been written with fervor and yet with objectivity. It continues the studies contained in the author's earlier book (1946) which dealt with the German occupation of The Netherlands during World War II. The present monograph is restricted to the special subject of the taking of hostages which has had comparatively little investigation compared with its widespread use during the last war. The author's survey shows a shocking deterioration in the moral standards of warfare in this respect even compared with the Roman period. Hostages were originally taken only as a pledge for the carrying out of a treaty or a line of conduct. The hostages were usually persons having some relationship to the obligation itself. The taking of innocent persons was first practiced on a large scale by the Germans in the Franco-Prussian War of 1870. The author believes this to be justifiable if done to prevent irresponsible attacks upon an invading or occupying army; but he vehemently denounces the taking and execution of members of the civil population "*après coup*" without proof of guilt. He quotes with approval the contention of a writer in this JOURNAL (Vol. 36, 1942, p. 272) that this completely lacks the character of preventive retaliation and constitutes a reign of terror.

The author discusses the practices of armies in the field as described in official manuals, including the United States Rules of Land Warfare under the Basic Manual of 1940. He finds that the American manual is not sufficiently explicit in distinguishing between actual practice and legitimate acts. On the other hand, he defends the judgment of the American Military Court at Nuremberg against the criticism of Lord Vansittart and others who believe that those who lead an aggressive total war against the inhabitants of a country have no right to treat resisting noncombatants as outlaws. He suggests, however, that the Vansittart doctrine may have become accepted since the organization of the United Nations (p. 123).

ARTHUR K. KUHN

Politics Among Nations. By Hans J. Morgenthau. New York: Alfred A. Knopf, 1948. pp. xv, 489. Appendix. Bibliography. Index. \$5.50.

The author's message would have had the wider audience it deserves had it been couched in a briefer and more popular form. To follow the cogent analyses of the factors bearing on his subject, their analogies in the national state, and their effect in the international field, is not exactly a popular pursuit. It is impossible in the scope of a brief review to give more than a superficial sketch of the solid contents of this interesting book.

The first thesis of the author is that international politics, like all politics, is a pursuit of power. Among states the purpose is to control or

influence the policies of another nation. It is to be distinguished from financial, economic, territorial, and military policies carried out for their own sake and on their own merits, although these policies, too, may be, and frequently are, used to advance political power. The sum of national power is not limited to military prowess, but includes geographic position, national resources, population growth, national character, mechanization, and economic stability. It is fatal, however, to believe that these factors are static in relation to other countries. They are liable to change with the advent of new discoveries, accessions, revolutions, catastrophes. It has been thought that power politics could be eliminated by various simple remedies such as the emancipation of colonies, the reduction of armaments, the removal of trade barriers, the destruction of capitalism, the spread of democracy, and even by international organization. But these have failed to accomplish the end in view.

The second thesis is that power politics (national or international) results in a contest over the *status quo* of the distribution of power. Among nations the contest is between the conservative states which desire to maintain the *status quo* in their own interest and the imperialistic states which desire to overturn it in order to expand their power. The author endeavors to explain the difficulties of detecting and countering these policies, and the fatal result of not doing so in time, as shown in modern history. The Marxian, Liberal, and "Devil" theories of imperialism as well as the types, goals and methods of applied imperialism are discussed.

The third thesis is that power politics is limited by certain factors which operate to hold excesses in restraint in the national state as well as in the international field. The most important of these factors are: balance of power (today a two-bloc balance), morality and public opinion (propaganda), and law (international law). In this discourse numerous interesting subjects are analyzed and evaluated, such as the patterns of balance of power, the effect of armaments, alliances and the "holder of the balance," decadence of international morality, and total war. The author examines the present-day ascendancy of nationalism and the effort to impose a nation's ethics on other nations ("national universalism"), and the fallacy in the emphasis given to world opinion.

The international lawyer will be interested in the treatment of international law as a retardent to international power, and the nature of its legislative, judicial, and enforcement functions. This includes such topics as codification, compulsory jurisdiction, lack of *stare decisis*, collective enforcement by the United Nations, the divisibility of national sovereignty in respect of international organs and the control of atomic energy.

The new elements in present-day politics are discussed in Part Seven—the new moral force (crusade for national ethics), the new balance of power and its elements, and total war through mechanization.

The fourth thesis is that peace is attainable under present world con-

ditions only through accommodation by the diplomatic method. The remaining third of the book is devoted to the elaboration of this thesis. Though the problem of peace is interwoven in the preceding chapters, it is here presented as a present-day problem of the first order. Beginning with a description of the peculiar conditions under which domestic peace flourishes, the author demonstrates that the same conditions do not exist in the international realm and for this and other reasons holds that it is futile to expect to obtain peace through the popular devices of disarmament, collective security, international police force, judicial settlement, peaceful change, or international government such as the United Nations. Furthermore, the possibilities of world peace under a world state are explored and held to be out of the question for the foreseeable future. The solutions by way of world conquest, or world federation on the models of Switzerland and the United States, are analyzed and shown to be fallacious. The fundamental lack among peoples of the world is the sense of a world community analogous to the community feeling which makes the national system work. The author thinks the cultural and functional agencies of the United Nations are not oriented to advance that feeling. It is a matter of long and slow growth to be encouraged through diplomacy and international association.

The author finds the best hope for peace in the divided world of today to be the revival of diplomacy as the art of the judicious use of persuasion, negotiation, and pressure. This art he believes has fallen into low estate by the upstart methods of parliamentary diplomacy, *viz.*, publicity, majority decision, and fragmentation (dealing with superficial issues while leaving the underlying cause untouched). These methods appear dramatic indeed on the world stage but really settle nothing. They are domestic methods applied to a supposed world community which does not exist.

Finally, it is a common misconception that a strong international organization, even a world state, would end the struggle for power. States would continue to use all the means available to advance their national interests even to the point of civil strife. Only the naïve can believe that national rivalry would be fully replaced by altruistic coöperation.

Without agreeing with all that is said, this is the most incisive book of its kind that has come the way of this reviewer.

L. H. WOOLSEY

How Foreign Policy is Made. By Kurt London. New York: Van Nostrand, 1949. pp. x, 278. Index. \$3.50.

The author of this volume set out to approach "the great issues of world politics from below, not from above." The opening part of the book briefly discusses the influence of geography, technology, and ideology, the rôle of domestic politics, public opinion, economic, and geo-political-military

factors; and the meaning, gathering, and processing of "intelligence" for the makers of foreign policy. In the next two parts, the formulation and execution, respectively, of foreign policy in the United States, Great Britain, France, and Russia are sketched, with a few remarks on the organization of Ribbentrop's office. To diplomacy the author concedes only a secondary rôle, although he describes various aspects of the diplomatic and consular service. On the subject of "Techniques of Implementation of Foreign Policy" he limits himself to discussing diplomatic communications and diplomatic sanctions, non-recognition, and what he considers the three forms of international propaganda: information services; cultural relations; and psychological warfare. A short last section deals with the manner in which foreign offices handle United Nations matters, and international organizations in general.

The book gives a good factual description of the structure and the mechanics of agencies which formulate and implement the foreign policy of the United States. There are also some pertinent observations on the realities of foreign policy in general, as that foreign ministers face the "ever-remaining problem of lack of time" (p. 167), or that "the last decisions affecting relations among nations are made among a handful of men who are not necessarily foreign affairs experts" (p. 168).

The shortcomings of the book are twofold, and stem from the fact that, on the one hand, the author covers his topic only to a limited degree, thus presenting an incomplete and unrealistic picture and, on the other hand, he advances many personal opinions which would need qualification, clarification and, above all, evidence to prove them.

For example, the techniques, problems, and advantages and disadvantages of international conferences are not discussed. It would have been helpful to analyze the working techniques of at least one such conference, for instance, the Disarmament Conference, or the combination of Foreign Ministers' and Allied Conferences which led to the Peace Treaties with Italy, Hungary, Rumania, Bulgaria, and Finland in 1947. Since the makers of foreign policy face hardly any greater issue than the settlements with or concerning Germany and Japan, the machinery of the Council of Foreign Ministers should have been described. Also, thirdly, a careful analysis of the rôle of military occupation in the conduct of foreign policy should have been provided. As the Secretary of the Army, Mr. Royall, stated in 1948, "the non-military part of the occupation job . . . is the principal job." The Berlin crisis was certainly the supreme proof of this statement. Equally important, but also not discussed here, are techniques of conferences between heads of government, such as the Potsdam Conference. Even if they are not the panacea which they are sometimes alleged to be, the refusal to hold such a conference alone is a major *datum* in inter-

national relations. Nor is there any reference to the machinery and influence of non-government groups, such as the International Chamber of Commerce, or the American Federation of Labor. The activities of, and attitudes toward, "governments-in-exile" and other dissident groups are not mentioned, although their aims, methods, and encouragement are of increasing importance.

The book could be compared to a cook-book which leaves out many principal dishes but says a lot about the guests. Pessimistic statements about the United Nations abound ("The United Nations seems unable to develop into a mature world forum, where disputes can be resolved without resort to violence," p. 12), as do extreme "cold war" formulations. For example, the outlook of three United Nations agencies is disposed of in three paragraphs (pp. 239-240): "instead" of the International Trade Organization (ITO), the author recommends "agreements . . . between like-minded nations." On the International Labor Organization (ILO) it is stated that the peculiar features of the trade unions of the Soviet Union (which is not a member of the ILO) "or [?] the Soviet Satellite nations . . . obviously . . . are detrimental for the creation of a global, unified labor program." This is an unusual definition of ILO aims, and the contention that the Eastern European employees' delegates have hampered the ILO Conferences is unfounded. Concerning UNESCO, it is declared that "a government . . . would commit national suicide by weakening the morale of citizens in the face of possible ideological or imperialistic aggression." How can it be "national suicide" to back UNESCO since UNESCO is precisely intended to eradicate aggression from the "minds of man"? There are other surprising statements, such as the definition of international propaganda as "the attempt by a government to convince a foreign people—over the head of that people's government—of the righteousness of its policy and to imply that failure of this policy will mean calamity" (p. 207). Various formulations are carelessly phrased, thus giving wrong information. For example: "The United States Department of Labor selects the United States delegates to the International Labor Organization" (p. 78); the members of the U. N. Secretariat are said to be exempt "from taxes" (p. 252); the General Assembly is said to adopt "legislative" resolutions (p. 254); and the United States is called a "parliamentary democracy" like Britain (p. 115). Grave misconceptions about the very nature of international law are fostered by speaking, for example, about "the extent a nation will subordinate its sovereign rights to international law" (p. 8). Since international law defines and circumscribes "sovereign rights," no such dichotomy can exist—as the author appears to point out himself on page 232.

JOHN H. E. FRIED

International Government. By Clyde Eagleton. (Rev. ed.) New York: Ronald Press, 1948. pp. xx, 554. Index. \$5.00.

This book deals with two diametrically opposed subjects, international law and international organization. Thus far the second rubric has brought us no luck. It is as great a failure as history records. We must, among other things, learn the reason for that failure.

In Part One the author posits a community of nations which exists in very elementary form. International law is also discussed in Parts Two and Three. It is on the whole a correct, but not very original, presentation of the subject. Part Two deals with membership in the community which does not yet exist. There is in this part no appreciation of the difference between international coördination and a municipal system of subordination. The United Nations, paradoxically enough, is working on a code of international law which can only be valid for independent states. To turn international law into a municipal system many changes are necessary, but these changes are not noted. Strangely enough, the League of Nations posited a system which has never succeeded and, we believe, never will succeed so long as nationalism exists. Many states have not yet reached this state of advancement. Nationalism and the new system are inconsistent, which some of our scholars have not noticed. If the United Nations were a success, it would soon be at war with the United States. Yet we notice that the Military Staff Committee has not yet organized a police force, let alone given such a force a function to perform. Nobody has yet seen an international force made up of national contingents to express the association's will to peace.

Part Three is devoted to a description of international administration, which is good so far as it goes. As already observed elsewhere, the League and the United Nations have performed useful functions in centralizing thought and observation and obtaining reports in these fields. It is not perceived why Part Four dealing with the League of Nations occupies so important a ground. The League does not now exist, as everyone knows. Gentlemen who share the author's views have done their best to subscribe to a League of Nations, and were not as observant of the interests of their own country as they might have been. The United Nations, which may be called the new League, repeats the incongruity of using combined force against the so-called aggressor, which, of course, every state that defies the League will be. Whether the United Nations has disposed of the issue of war, each investigator can examine for himself. The author is not satisfied with the United Nations' function, and therefore jumps to international government as the only way out of the morass. He does not explain why the international government can be more successful than the United Nations, although, to be sure, one cannot deal with the United Nations or international government without knowing the specific details of the new order,

which the author does not disclose. With no intention to be unkind to the author, this specification seems absolutely necessary as a condition precedent to judging whether the international government is any more practical than the existing devices. John Bassett Moore, our greatest authority in this field of learning, looked with more than scepticism upon the ideas which vaguely infiltrate into such a concept as international government.

EDWIN BORCHARD

L'O.N.U. et La Paix: Le Conseil de Sécurité et le Règlement Pacifique des Différends. By A. Salomon. Paris: Les Éditions Internationales, 1948. pp. x, 204. Annexes. Index. Fr. 500.

It is the subtitle rather than the title of this book which indicates its content. While there are some fifty pages of background development, the book is concentrated upon Chapter VI of the Charter. Mr. Salomon has devoted his effort to an analytical study of the text of Chapter VI, with some reference to the practice of the Council. He works with precise and somewhat rigid logic. As a result, though a great many interesting points are raised, a clear picture of the actual operation of the Security Council is not given. Perhaps a clear picture of this action is too much to hope for.

In the introduction and the first two chapters he traces the evolution of the Charter—which he regards as a poor job of drafting—from the Atlantic Charter to date. He argues that *travaux préparatoires* may be legitimately used to understand the Charter, and he leans heavily upon them. In Chapters III and IV he discusses the action of the Security Council, in Chapter V the voting procedure, and in Chapter VI the rules of procedure.

He is naturally much interested in the meaning of the word "dispute" and in the differences between a dispute and a situation. He agrees with Gromyko that the Council must, under Article 34, decide that a dispute of the proper type exists before it can make recommendations, and he insists that the rule of Article 27, paragraph 3, does not apply to this decision. He discusses the action of the Security Council under Chapter VI under three headings: (1) legal disputes, with regard to which the Security Council, in the Corfu Channel case, misconceived its function and wasted three months in sterile discussion before referring the question to the Court; (2) the difference between a dispute and a situation, in the latter of which he thinks that a party (Can there be a party to a situation?) can vote; (3) the effect of Council decisions which have no obligatory force.

He considers in Chapter IV the methods by which Council action is initiated—by its own spontaneous intervention, by a party, by a third party, or by the Secretary General. In practice, he says, all matters have been brought to the Security Council by Member States; it may be observed

that this is no longer true. He finds (as have others) the word "action" in Article 11, paragraph 2, difficult to explain. Under Rules of Procedure he discusses the question whether the mere statements by a party forces the Security Council to discuss the issue, and concludes that if this were true, the Council would not be the master of its own agenda.

In general, the work is a good theoretical discussion, raising many points worthy of study, but not taking into sufficient account the developing practice of the Security Council.

CLYDE EAGLETON

La Sécurité des États et la Sécurité du Monde. By Charles Chaumont. Paris: Librairie Générale de Droit et de Jurisprudence, 1948. pp. 156.

This little book (90 pages of text), dealing with the eternal problem of security as it presents itself in the particular context of the Charter, is a valuable addition to the legal and political literature on the United Nations. It is not at all outdated by the stormy developments of the last two years.

It would be unjust to the author, who is professor of public law at the University of Nancy and who participated as legal adviser of the French Government in the sessions of the United Nations beginning with San Francisco, to describe this book as another plea for world government, a term he does not use. However, the final conclusions of the author will be welcomed by the enthusiasts of world government. In the first part the author gives a brilliant legal analysis of the security mechanism of the Charter in its two forms (the procedure of pacific settlement and the procedure of coercion), followed by a lucid analysis of the (not yet existent) special mechanism of atomic security. It is interesting to discover that, according to Mr. Chaumont, the Soviet concept of atomic security (refusal to accept international control on its territory) is in agreement with the political philosophy of the United Nations, based as it is on the supremacy of, and agreement between, the Big Powers. He regards the attitude of the United States (non-application of veto to atomic security) as a retreat from the basic philosophy of the Charter, but he finds that the United States does not go far enough, since she does not intend to reject *in toto* the security system of the Charter. This latter system is based on the fallacious thesis that the security of the world is the product of the security of its components (individual states). Only through exclusion of the states can the security of the world be guaranteed, and this is possible by substituting international democracy for international dictatorship. Many a reader will be startled to learn that the system of the Charter is that of dictatorship, but, according to Mr. Chaumont, dictatorship is world domination by one or two Powers which is inevitable in a system of international government based on representation of states in the organs of the Organization. The antithesis, the international democracy, is domination

by the world collectivity, expressing the will of its majority in a system of international government based on the existence of real international institutions emanating *directly* from the world community. The author believes that it would not be difficult to describe, by an effort of legal imagination, the precise structure of international institutions of security based on the exclusion of states, but he abstains from doing so in the context of his study.

The reader lays aside this little book feeling that it ends on the most interesting point. He would like to know that the monograph will be continued. Incidentally, Ambassador Fouques-Duparc reveals in his preface that he has long ago exhorted Mr. Chaumont to write a commentary on the Charter. One hopes that the author will soon elaborate and expand his ideas in a more comprehensive volume.

JACOB ROBINSON

Yearbook on Human Rights for 1946. Prepared by B. Mirkine-Guetzévitch and Ernest Hamburger. (Publication No. 1948 xiv 1.) Lake Success: United Nations, 1947-1948. pp. 450. \$5.00.

This yearbook contains the texts of all Bills of Rights in effect on December 31, 1946, together with all other statutory provisions pertaining to human rights enacted during the calendar year 1946. In addition the volume presents a series of studies supplied by well-known authorities in this field for those countries such as Great Britain, Australia, New Zealand and others, where written instruments protecting and guaranteeing human rights do not exist. The book is impressive as an example of diligent and thorough research. It must be considered as a standard textbook on the subject. It is probably the most complete collation of legal and factual data in this field. It covers statutory and common law, together with monographs on the subject for a total of seventy-three countries. Future statutory changes and court decisions pertaining to human rights throughout the world are to be recorded in additional volumes for each succeeding year.

The constitutional provisions with respect to civil liberties constitute both a barometer and a determinant. Looking over these civil liberties provisions, it is evident that few new principles were expounded and no old landmarks obliterated.

Where, as in Great Britain, Australia, Canada and New Zealand, human rights are not based on any fundamental laws like the Constitution of the United States, the *Yearbook* gives a brief and concise survey of the law governing the subject. The survey of Great Britain, for instance, prepared by Dr. Cecil Carr, shows how human rights and fundamental freedoms are fully protected in the absence of a written constitution. Although the very same rights are protected by constitutional provisions

in the United States, Professor Robert E. Cushman, Cornell University, who prepared a study on human rights under the United States Constitution, comes to a conclusion, which in essence does not widely differ from Cecil Carr's view when he states:

The vitality of civil liberty cannot, of course, be measured in terms of constitutional guarantees, or court decisions enforcing them. It depends in the last analysis upon the degree to which the public opinion of a nation, state, or local community values civil liberty and demands its effective protection. (*Yearbook*, p. 326.)

To sum up: This volume is a pioneer work in its field. The editorial work is excellent.

ALEXANDER LORCH

L'Organisation Européenne de Coopération Économique. By H. T. Adam. Paris: Librairie Générale de Droit et de Jurisprudence, 1949. pp. 292. Index.

The new developments in Europe or Western Europe, such as the Marshall Plan, Customs Unions, Brussels Treaty, the federalist movement, have produced many writings in many languages; but most of them are small in volume, and entirely political, and historical in character. Very different is the book under review. It is an exhaustive, strictly legal study of the European Organization for Economic Coöperation. Being a technical study, the book does not go into a criticism of the political wisdom of this or that rule, nor into a prophecy of the success of the Organization.

Professor Adam of the University of Paris, who was the Legal Adviser to the Paris "Conference of the Sixteen," gives a complete and detailed exposé of the history, the creation, the juridical sources of the Organization, its composition, membership, functions, authority, and structure, modification and revision and of the general obligations imposed upon the members. Incidentally, many other legal problems are dealt with; the inclusion of the Western Zones of Germany, for example, raises the whole difficult problem of the legal status of occupied Germany.

It is not possible, within the framework of a book review, to go into details concerning the many problems dealt with in the volume. But it should be pointed out that this book is much more than an exhaustive, legal analysis of this particular organization. The tracing back of the type of the organization to the "combined boards" of the two world wars, the characterization of those "combined boards," their distinction from the "specialized agencies" are very valuable. Throughout, the Organization is studied in comparison with other organizations of international administration and other "public international services." The clear distinction between "functions" and "authority" is highly interesting; the same is true of the distinction between "juridical capacity" and "inter-

national personality" of international organizations, between "authority *pro foro interno*" (such as budget, appointment of officers and so on) and authority with regard to the member states. It is not the functions, but the authority of an international organization which determines the international advance at the expense of national sovereignty. The functions exclude only the raising of the exception of incompetence which otherwise could be made under the heading of "*domaine réservé*" against treating such matters; but the final decision remains with the sovereign states. The authority of an international organization again does not take away this final decision of the sovereign states as long as the organization is restricted to legally non-binding recommendations, or to draft conventions which need ratification. One can only speak of real authority, of a real diminution (and not only of a limitation) of national sovereignty, where the organization is authorized to make legally binding decisions which can be opposed to, and enforced against or without the will of, a member state. But even if such authority is granted, it can be nullified by the rules concerning the *exercise* of this authority; thus the "veto" in the Security Council or the rule of unanimity in the European Organization for Economic Coöperation. Results therefore, in the most difficult situations could only be reached by extra-constitutional means, such as "the arbitration by experts" or the "mediation" of the Secretary General. That this was possible, was—here lies the similarity with the "combined boards"—rather a consequence of material pressure and of pressure from without the organization (United States).

The author shows in the most interesting way the "continuous battle between national sovereignty and the idea of international organization," not only in the making of a new international organization, but also in the work of an existing one; even where states have seemingly made concessions, there can always appear what the author calls "*revanches perfides de la souveraineté*."

The book is—a thing in itself rare in these times, where so much of the literature on "international law" is superficial, not based on legal analysis and on what the states do, but only on the writer's wishful thinking—not only welcome as a real study from a legal point of view, but constitutes at the same time an important contribution to the problems of international administration and international law in general.

JOSEF L. KUNZ

The Evolution of the Zollverein—A Study of the Ideas and Institutions Leading to German Unification between 1815 and 1833. By Arnold H. Price. Ann Arbor: University of Michigan Press, 1949. pp. xii, 298. Appendix. Index. \$3.50.

Is there such a thing as an "*a priori*" of the difficulties of international organization"—the ever-recurring difficulties which arise from the contradic-

tion between the members' desire for maintenance of "sovereign equality" and the organizational requirements of a technically functioning organization—difficulties which time and again have caused international endeavors to be beset with problems such as voting by majority *vs.* the veto, establishment of genuine international machinery *vs.* entrusting, and trusting, members as such with the execution of decisions, etc.?

Some implicit discussion of these and related problems comes from quarters where one would hardly expect it. Mr. Price's book is primarily a *historical* study of that early example of international organization, the German *Zollverein*. It seems to be little known even among experts that its foundation, in 1834, was preceded by two decades of planning and actual organization, the latter generally on a bilateral basis, which ultimately resulted in the better-known multilateral arrangement. But the problems which only in our days have become of so much more generally realized import, were already all present: What should, and would, be the influence of the two major Powers in which power then was polarized in the region (Austria and Prussia)? Would a strong state, such as Prussia, establish an international arrangement with two weaker neighbors without unduly restricting their independence? How would the implementation of international obligations by and within member states be guaranteed and supervised? The student of international arbitration may be interested in early examples of arbitration provisions. Organs of some of the systems were, under certain conditions, to function as arbitration boards. The student of the history and origin of international organization will be intrigued by the connection which the author establishes between certain features of the *Zollvereine* and what seems to be one of the first modern examples of international administration: the Central Commission for Navigation of the Rhine (1804).

The author of the present study, a historian, is primarily interested in tracing the ideological background of developments, such as the influence of nationalistic, liberal, reactionary, purely economic, and bureaucratic trends upon the evolution of the organization, or the influence of such men as Friedrich List. This he has done with commendable care, and the study is a model of clear and meticulous history-writing. For the reasons indicated above, it is of broader interest to the student of international relations, international law, and international organization also.

JOHN H. HERZ

Legal Philosophy from Plato to Hegel. By Huntington Cairns. Baltimore: Johns Hopkins Press, 1949. pp. xvi, 584. \$7.50.

This book sets forth the opinions of thirteen Western philosophers on legal theory. While not primarily concerning itself with ideas on government or the nature and purpose of the state, in the absence of a clear

borderline—we need only read about the first philosopher dealt with, Plato, to realize that there has never been a scholar that treated “law” as a subject completely apart from the “state”—the student of public and international law will find abundant material closely akin to his subjects. With the conspicuous exception of Bacon, Cairns has excluded jurists in the strict sense such as Grotius, Pufendorf, Coke, or Bentham.¹

In a world whose conception of a good lawyer is that of a man who knows a great deal of law, and not more, the author would deserve to be praised if his book were but a mediocre digest-anthology. As a matter of fact, however, the author's accomplishment goes far beyond what the title indicates. For the book relates not merely the leading doctrines of the law but rather presents them, in a truly objective fashion, to the modern reader—lawyer, as the author optimistically seems to hope—in the light of present-day theories as reflected in writings and court decisions. Thus Bacon's discussion of so-called *legis lacunae* is traced forward to our Supreme Court's Original-Package Doctrine, and Thomas Aquinas' postulate that new laws must be made known to the public is tied in with the modern promulgation methods of civil law countries.

The “never ending conflict between the natural-law theory and positivism” (Kelsen) permeates the entire work. Cairns does justice to many a philosopher, notably Aristotle and Locke, often claimed to be natural lawyers at vociferous Bar meetings and the like, by showing that they knew well the difference between positive law and mere postulates as to what the law ought to be.

International law, uncodified and uncertain as it is, has always been most intimately connected with philosophy and many disputes have centered around “eternal principles of justice.” International lawyers, therefore, ought to place this book on top of their “must” lists.

REGINALD PARKER

NOTES

Grundlinien der antiken Rechts- und Staatsphilosophie. By Alfred Verdross-Drossberg. (2nd ed.) Vienna: Springer-Verlag, 1948. pp. viii, 184. Index. \$4.50. Because of current controversy over the meaning of Plato for our time, the section dealing with Plato has been expanded in this edition of the study of legal philosophy in antiquity which the noted Vienna authority on international law completed in 1943 and published in 1946 after the war. He emphasizes that the idea of law arose among the Greeks as early as Hesiod and grew into a well-developed doctrine of democracy, differing from modern democracy, however, in excluding slaves and women from political power; that Plato's philosophy of the state can not be taken from his totalitarian-tinted *Republic* alone, without consideration of his later views in the *Laws*; and that Plato's doctrine went beyond the confines of the Greek city-state and culminated in a species of international law contemplating the peaceful settlement of disputes between

¹ Cicero, who is included, was not a lawyer, but a statesman and orator. Cf. this writer's book review in 61 *Harvard Law Review* 1371 (1947).

states. Verdross reviews in an interesting treatment the pre-Platonic thinkers, Plato, Aristotle, Cicero, and the Stoics. These teachings foreshadowed the "natural law" theories of the Christian era by elaborating the notion of a rational world order embracing the universal legal community of mankind.

Hugonis Grotii: De Jure Belli ac Pacis. An Extract by B. M. Telders. (Ed. by J. Barents and A. J. S. Douma.) The Hague: Martinus Nijhoff, 1948. pp. xvi, 196. Fl. 7.50. This volume of less than two hundred pages presents the Latin text, with marginal headings in English by Professor Telders, of those portions of the famous classic by Grotius which deal with "what nowadays is considered to belong to international law." Eliminating the erudition which is not of current applicability shortens the text so that it may be consulted conveniently by those seeking the views of Grotius on present-day problems of international law.

As the preface by Judge van Eysinga explains, this condensation was made by Telders while a prisoner in the concentration camp of Bergen-Belsen where he died on April 6, 1945, a few days before Germany's capitulation:

Who could have been a better companion in his lonely cell than Grotius, who, when himself a prisoner, had found moral support in undaunted intellectual work! . . . Telders' father gave the copy of Grotius' book on which his son had worked to the Historical Museum of the Leyden University, where it will remain in memory of one of the most courageous and gifted sons of the Netherlands. (p. xvi.)

This reviewer, as a pupil of the able and heroic Dutch jurist, Telders, salutes with gratification this volume as a fitting tribute to the memory of his labors and his devotion to the highest traditions of international law.

EDWARD DUMBAULD

Towards a Realistic Jurisprudence. A Criticism of the Dualism in Law. By Alf Ross. Copenhagen: Einar Munksgaard, 1946. pp. 304. 18 Danish Cr. Alf Ross' *A Textbook of International Law* is based, as this writer in his review thereof stated (this JOURNAL, Vol. 43 (1949), pp. 197-199), on his "realistic" philosophy of law. The book under review gives an exposition of this philosophy. Only a few remarks can be made here. In Sweden a school of jurisprudence (Hägerström, Lundstedt, Olivecrona) has sprung up, which, as to its doctrine, is similar to the American "realistic school." Law is not a system of norms, but consists only of facts. Hägerström laid it down that the traditional jurisprudence for which law is at the same time reality and validity must lead to hopeless logical contradictions.

Alf Ross, the Dane, a scholar of great talent, started in Vienna from Kelsen, but has developed toward a "realistic jurisprudence." In this book, intended to be a settlement with the dualism in law, he starts from Hägerström's thesis; he shows the dualism of reality and validity and demonstrates the antinomies which flow from it. But he clearly recognizes that Jerome Frank's theory, according to which law is nothing else but the theoretical prediction of what the judges will do, is untenable; the element of validity cannot be eliminated from the law without eliminating exactly the legal element from law. The element of validity must be retained,

but must also be recognized as a fact; that is the "true realism." Law is for Ross a set of social facts, a certain human behavior and ideas and attitudes connected with it. Metaphysics is naïveté. Metaphysical justice is a complete absurdity. "Validity" is nothing objective, has no meaning, is a mere word. Only fact-judgments which can be true or false have a logical meaning. Validity is conceptually rationalized expressions of certain subjective experiences of impulse, carrying with them a peculiar illusion of objectivity, and having a symbolical value.

It is obvious that this "jurisprudence" is completely untenable. Ross is a victim of this "scientism" which believes that there are only sciences of phenomena, while everything beyond is nonsense. He is a victim of the "neopositivism" of the "Vienna Circle," whose leader Carnap tells us: "Value judgments are nonsense." It is this scientism which has contributed to bringing the present catastrophe upon our Western Christian culture.

JOSEF L. KUNZ

The Charter and Judgment of the Nürnberg Tribunal. History and Analysis. Memorandum submitted by the Secretary General (Doc. A/CN.4/5, March 3, 1949). Lake Success: United Nations International Law Commission, 1949. pp. iv, 100. \$.75. This memorandum contains a brief and useful survey and summary: (1) of the Nürnberg Charter and trial; (2) of consideration in the United Nations of plans for the formulation of the principles of the Nürnberg Charter and Judgment; and (3) of the application of the Charter by the Nürnberg Tribunal. There is also an addendum on the trial of major Japanese war criminals, and appendices contain the texts of the Moscow Declaration of October 30, 1943, on German atrocities and the Agreement for the Establishment of an International Military Tribunal. Part III furnishes a convenient digest of the lengthy judgment of the Tribunal. The principal legal problems are classified and analyzed, but, as may be expected in an official memorandum of this type, there is no critical comment upon the legal bases of the judgment.

Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928-1948. Lake Success: United Nations, 1948. pp. ix, 1202. \$10.00. This well-edited volume is designed as a continuation of *Arbitration and Security: Systematic Survey of the Arbitration Conventions and Treaties of Mutual Assistance Deposited with the League of Nations* (C.653.M.216.1927.V), published by the Secretariat in 1927. It is, however, more complete than the preceding collection, since it contains the texts of all available instruments concluded during the period covered. It may therefore be conveniently used together with Max Habicht's *Post-War Treaties for the Pacific Settlement of International Disputes* (Cambridge: Harvard University Press, 1931).

A valuable feature of the present collection is found in Part I, which contains a full systematic analysis of the more than two hundred texts of treaties reprinted in Part II. In the 327 pages of the first part the basic types of treaties, general jurisdictional clauses, reservations, etc., are classified on a comparative basis, and each of the sections into which the four chapters are divided is followed by excerpts from treaties illustrating the point discussed in the analytical introduction.

This *Survey* was prepared by the Secretariat for the Interim Committee

of the General Assembly. It will be a valuable aid to that Committee in its present activities, and will be further welcomed by the international law profession in general, especially since it will be complemented by the *Reports of International Arbitration Awards*, two volumes of which have already been published by the Secretariat.

LAWRENCE PREUSS

Western European Union. By R. G. Hawtry. London: Royal Institute of International Affairs, 1949. pp. 126. 5 s. This small book is the outcome of the appointment of a Study Group of the Royal Institute to examine the implications of a Western European Union for Great Britain. The author has no illusion about the present situation: the economic situation of Western Europe in the spring of 1947 was desperate; there is a clear relapse into power politics; Western Europe looks for a new balance of power; the veto is an open admission by the United Nations of its impotence. Not all Western European states can be included: Spain is excluded for political reasons; Switzerland and Sweden hardly will be willing to coöperate in defense, as the Swedes have "every reason to be thankful for the preservation of their neutrality throughout the two World Wars" (p. 18). The problem of Germany presents a dilemma; there is, on the one hand, the fear of France; on the other hand, European recovery is impossible without German economic recovery, and even "the defensive power of a Western European Union without German resources might be found lamentably inadequate" (p. 22).

The author then fully surveys all problems of political, military and economic coöperation of Western Europe from a British point of view in order to find a way "to reconcile Great Britain's interest in Europe with her interests overseas."

The report is absolutely adverse against a Western European Federation, against a United States of Western Europe. That would be unacceptable to Britain, because of the great differences in political behavior between the Island and the Continent, because of the political instability of France (and Italy), and because of incompatibility of such a federation with the Commonwealth of Nations. The author also opposes such proposals as a merger of armaments, a customs union, a common currency, "as they are bound to lead to formal federation" (p. 118). But he is in favor of coöperation and looks to the Commonwealth as a model; he is also greatly in sympathy with extending the Western European into an Atlantic Union.

JOSEF L. KUNZ

Looking Toward One World. Edited by Ernest Minor Patterson. Philadelphia: American Academy of Political and Social Science, 1948. pp. vii, 123. \$2.00. Fourteen addresses delivered at the 1948 meeting of the Academy, on Strains in the Near and Middle East, Problems in the Far East, Adjustments in Central Europe and Bases of World Unity, are brought together in the issue of the *Annals* of the Academy for July, 1948. A paper by an unidentified Chinese leader is added under the second head. Readers of this JOURNAL will be particularly interested in the addresses, under the fourth head, by Chang Hsin-hai on the Moral Basis of World Peace; Julius Katz-Suchy on One World through the United Nations; and James P. Warburg on the United States and the World Crisis. Dr. Katz-Suchy, permanent representative of Poland to the United Nations, submits data of great psychological value in support of his view that the United

States and several other nations, *not including* those of the Soviet group, "are trying to divide the world into hostile camps and are not living up to the solemn pledges of the Charter."

EDGAR TURLINGTON

European Ideologies: A Survey of 20th Century Political Ideas. Edited by Feliks Gross. New York: Philosophical Library, 1948. pp. xvi, 1076. Index. \$6.00. This volume of twenty-seven essays by twenty-four authors is intended to represent a survey of those aspects of twentieth-century ideologies not normally covered in textbooks in the field. The editor tells us in the preface that this volume is intended for readers already familiar with rudimentary principles of modern European intellectual movements. He also warns us that the volume is not free of many of the shortcomings of all anthologies such as diversity of views, lack of uniformity in treatment, and both omissions and duplications.

Such a caveat, however, does not prepare one for what follows. Several of the essays completely ignore the subject of the volume. That on Socialism, one of the longest essays in the book, is devoted entirely to a history of the trade union movement, with only a few paragraphs on this century, and little or nothing on the ideology. The same may be said for the chapters on "Nationalism," "Regionalism and Separation," "Zionism," and "Anti-Semitism." Several essays, while containing much useful information, are so poorly organized as to obscure the writers' viewpoint. Examples include "Anti-Semitism," and "Hispanidad and Falangism." Several add nothing to our knowledge either because they merely repeat recent events without evaluation (so "Anarchism and Syndicalism, A Critical View," "The Destinies of the Russian Peasantry") or because they are superficial ("Communism," "Regionalism and Separatism," and "Fascism"). The essay on "Communism," for example, tells us that democracy is lacking in the Soviet Union because there are no free elections and because there is no freedom for the individual; that Marxism is not being followed because classes and inequalities still exist in fact and the state has not yet disappeared. Finally, several chapters contain statements or conclusions that are at least questionable. Thus we read that natural rights were the basis of feudal society (p. 234); that in such society the King could do no wrong (p. 237); that T. H. Greene was a revisionist socialist (p. 286); that Soviet Communism is not nationalistic (p. 303); and that the C. G. T. in France was under Communist control until 1947 (p. 333).

A few of the essays are worth-while additions to the literature in the field. That on "The Liberal Tradition in Russia," while it does not establish a "tradition," discusses some ideas and individuals too often overlooked. "Anarchism and Anarcho-Syndicalism" is likewise an able survey of a world movement based on considerable detail. "Agrarianism" is an original analysis of an action program, one of the best on the subject that this reviewer has seen. The chapter on "Catholicism" is well done, although it skirts the question of religious toleration in Catholic countries. The "Origins of Fascism" is also well done. "Economic Planning Without Statism," and "Humanism and the Labor Movement" are suggestive and useful essays both because of the information contained as well as because of the clarity with which the issues involved are formulated.

On balance, the volume will have only a limited usefulness and that in the hands of a discriminating reader.

FOSTER H. SHERWOOD

American-Australian Relations. By Werner Levi. Minneapolis: University of Minnesota Press, 1947. pp. 184. Index. \$2.75. Here within the compass of 173 pages is the best interpretation of American-Australian relations yet to appear in print. The author presents a synthesis of American and Australian policies from 1783 to 1946. For that reason alone the book merits careful reading. Yet thoroughness of research, marked by brevity and conciseness, is the distinctive quality of this scholarly work. The author has stressed the interpretative aspects of the subject at hand rather than mere facts, figures, and tables. The treatment refutes the popular notion that size and length should be the criterion of a scholarly work.

This publication represents a pioneering spirit of inquiry into a field of international affairs hitherto unexplored by political scientists. More significantly it serves as a serious introduction for more detailed investigations into American-Australian relations. As a historical yardstick the book adds a needed perspective to such informative books as C. Hartley Grattan's *Introducing Australia* or H. V. Evatt's collection of speeches on *Australia in World Affairs*.

The book spans a long era in American-Australian relations—from our revolutionary period to the postwar year 1946. The early period in foreign relations was marked by improvisations, doubts and fears engendered by a boisterous spirit of Yankee commercialism (Chapters 1-4). Not until after 1850 did an awareness of a national destiny stir Australia internally. Imperial connections with mother England, meanwhile, led Australians to keep a weather-eye out for possible trouble in the Pacific. Imperialist rivalry among the Great Powers thus tended to shape Australian foreign policy long before 1914. To contend with these imperialistic rivalries Australia pursued two objectives: the establishment of a balance between Russia and Japan in East Asia and the gradual forging of a Pacific security triangle involving the United States, Great Britain, and Australia. By 1941, in view of Japan's challenge to supremacy in the Pacific, it was clear that neither assumption provided security (Chapters 5-9). Since 1945 Professor Levi foresees signs of troubles in the new Pacific. The United States obviously is the Super-Power, yet Australia is unwilling to be the junior partner. Mindful of its national pride and wartime achievements, Australia demands full partnership in Pacific affairs. Whether the techniques of successful coöperation between a giant and a middle Power can be improvised remains to be seen. By mutual accommodation alone, Levi feels, can future relations between these two Pacific countries be solved (Chapters 10-12).

It is to be noted that the book is primarily concerned with political and economic aspects of American-Australian relations. There is little material on international law or organization, a fact not clearly inferred from the title. In some respects the author might have strengthened his analysis. While the impact of American policy upon Australia is clearly demonstrated, the motivations of American foreign policy are less clearly developed. More insight into the nature of the British imperial system and the federal movement might have offered more light on the inevitable question of why Australia did not duplicate America's experience with independence. Only a partial answer is offered in Chapter 5. It is not altogether clear, in view of Australia's determination to prevent Japan from expanding in the Pacific, why Prime Minister Hughes offered no ob-

jections to the Greene-Motono arrangement regarding the disposition of the German islands (pages 93 and 94). No mention is made of Australia's views regarding the frequent charges of Japanese fortification of the Mandates prior to 1941.

Diligent attention to documentary sources is a noteworthy aspect of this work. Good use has been made of Australian and English parliamentary records as well as of the American *Congressional Record*. For the early period Professor Levi relied on *Hunt's Merchants' Magazine*, the *Historical Records of Australia*, as well as biographical records. Scholars will note the use of the papers of Admiral Charles S. Sperry and of the unpublished manuscript of Breckenridge Long, formerly of the State Department. The author, moreover, in writing the book consulted many key figures involved in the Pacific question at the Peace Conference in 1919. On the whole a balanced treatment is preserved throughout the review of American-Australian relations.

N. MARBURY EFIMENCO

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UNITED NATIONS
REPORT OF THE INTERNATIONAL LAW COMMISSION
COVERING ITS FIRST SESSION, APRIL 12-JUNE 9, 1949*

PART I: GENERAL

CHAPTER I

Introduction

ESTABLISHMENT AND MEMBERSHIP OF THE COMMISSION

1. The International Law Commission was established by resolution 174 (II) adopted by the General Assembly at its 123rd plenary meeting on 21 November 1947.

In pursuance of the same resolution and in accordance with the provisions of the Statute of the Commission,¹ the General Assembly, at its 154th and 155th plenary meetings on 3 November 1948, elected the following fifteen members:

<i>Name</i>	<i>Nationality</i>
Mr. Ricardo J. Alfaro	Panama
Mr. Gilberto Amado	Brazil
Mr. James Leslie Brierly	United Kingdom
Mr. Roberto Córdova	Mexico
Mr. J. P. A. François	Netherlands
Mr. Shuhsi Hsu	China
Mr. Manley O. Hudson	United States of America
Faris Bey el-Khoury	Syria
Mr. Vladimir M. Koretsky	Union of Soviet Socialist Republics
Sir Bengal Narsing Rau	India
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Jean Spiropoulos	Greece
Mr. Jesús M. Yepes	Colombia
Mr. Jaroslav Zourek	Czechoslovakia

PLACE AND DURATION OF THE FIRST SESSION

2. The first session of the Commission opened on 12 April 1949, at Lake Success, New York. In the course of the session which terminated on

* U. N. General Assembly, Official Records, 4th Sess., Supp. No. 10 (A/925), June 24, 1949.

¹ See Official Records of the second session of the General Assembly, Resolutions, page 105; also Supplement to this JOURNAL, Vol. 42 (1948), p. 1.

9 June 1949, the Commission held thirty-eight meetings. With the exception of Faris Bey el-Khoury and Mr. Jaroslav Zourek, who were unable to attend, all the members of the Commission were present.

ELECTION OF OFFICERS

3. At its first and second meetings, on 12 and 13 April, the Commission elected, for a term of one year, the following officers:

Chairman: Mr. Manley O. Hudson;
First Vice-Chairman: Mr. Vladimir M. Koretsky;
Second Vice-Chairman: Sir Benegal N. Rau;
Rapporteur: Mr. Gilberto Amado.

SECRETARIAT

4. Mr. Ivan S. Kerno, Assistant Secretary-General for Legal Affairs, represented the Secretary-General. Mr. Yuen-li Liang, Director of the Division for the Development and Codification of International Law, acted as Secretary of the Commission.

RULES OF PROCEDURE

5. In accordance with rule 150 of the rules of procedure of the General Assembly, the Commission decided that the rules relating to the procedure of committees of the General Assembly (rules 88 to 122 inclusive), as well as rules 38 and 55, should apply to the procedure of the Commission. It was further decided that the Commission should, when the need arose, adopt its own rules of procedure.

AGENDA

6. Taking into consideration its functions under the Statute as well as the tasks assigned to it by resolutions of the General Assembly, the Commission adopted its agenda in the form in which it had been drawn up by the Secretariat. It consisted of the following items:

(1) Planning for the codification of international law: survey of international law with a view to selecting topics for codification (article 18 of the Statute of the Commission).

(2) Draft declaration on the rights and duties of States (resolution 178 (II), adopted by the General Assembly on 21 November 1947).

(3) (a) Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal; (b) preparation of a draft code of offences against the peace and security of mankind (resolution 177 (II), adopted by the General Assembly on 21 November 1947).

(4) Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions (resolution 260 (III) B, adopted by the General Assembly on 9 December 1948).

(5) Ways and means for making the evidence of customary international law more readily available (article 24 of the Statute of the Commission).

(6) Co-operation with other bodies: (a) consultation with organs of the United Nations and with international and national organizations, official and non-official; (b) list of national and international organizations prepared by the Secretary-General for the purpose of distributing documents (articles 25 and 26 of the Statute of the Commission).

7. In considering its programme of work, the Commission had in mind that questions referred to it by the General Assembly² should be taken up without undue delay. At the same time, it was recognized that the codification of international law and, more immediately, the selection of topics for codification, constituted one of the Commission's main functions. It was accordingly, agreed that the Commission should first take up item (1) of its agenda.

The Commission considered during its first session every item on the agenda. The action taken in respect of every such item, except the draft Declaration on Rights and Duties of States (item (2)), is set out in part I of the present report. Part II of the report is devoted to the consideration given to the draft Declaration on Rights and Duties of States.

PREPARATORY WORK BY THE SECRETARIAT

8. The Commission had before it a number of memoranda relating to the several items of its agenda, submitted by the Secretary-General in pursuance of resolution 175 (II) of the General Assembly, which instructed the Secretary General to do the necessary preparatory work for the beginning of the activity of the Commission.³

² Items (2), (3) and (4) of the agenda.

³ The memoranda submitted by the Secretary-General were the following:

1. Survey of International Law in relation to the Work of Codification of the International Law Commission (A/CN.4/1/Rev.1).

2. Preparatory Study concerning a Draft Declaration on the Rights and Duties of States (A/CN.4/2).

3. The Charter and Judgment of the Nürnberg Tribunal: History and Analysis (A/CN.4/5).

4. Ways and Means of making the Evidence of Customary International Law more readily available (A/CN.4/6).

5. Historical Survey of the Question of International Criminal Jurisdiction (A/CN.4/7).

6. International and National Organizations concerned with Questions of International Law: tentative list (A/CN.4/8).

CHAPTER II

Survey of International Law and Selection of Topics for Codification

THE POWERS OF THE COMMISSION WITH RESPECT TO THE SELECTION OF TOPICS

9. Under article 18, paragraph 1, of its Statute, the Commission was directed to "survey the whole field of international law with a view to selecting topics for codification." In undertaking this function, the Commission had to determine at the outset its precise powers and, in this connexion, it had to clarify the meaning and implication of article 18, paragraph 2. This paragraph provides that "when the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly." The question arose as to whether, under this provision, the Commission was competent to proceed with the work of codification under articles 19 to 23 without awaiting action by the General Assembly on recommendations made by the Commission under article 18, paragraph 2. The Commission consulted the records of the second session of the General Assembly, at which the Statute was adopted and, in particular, those of Sub-Committee 2 of the Sixth Committee, which prepared the draft.

10. Some members of the Commission held the view that under the said paragraph the Commission was bound to submit to the General Assembly any topics the Commission had selected for codification and to await the General Assembly's approval before beginning the work of codification of such topics. According to Mr. Vladimir M. Koretsky, inasmuch as the Commission was not an autonomous organ enjoying complete liberty, but merely a subsidiary organ of the General Assembly, it existed to carry out certain tasks which had been entrusted to it by the General Assembly and any task it undertook must be sanctioned by the latter. In so doing it must adhere strictly to its Statute, which laid down a procedure for the different stages of the work of codification. During the first stage, the Commission had the duty of discussing the choice of topics for codification; in the second stage, that of presenting a report to the General Assembly and of making recommendations on the choice of subjects. Only when the General Assembly had approved the choice of subjects could the Commission proceed to the other stages envisaged in articles 19 to 23 of its Statute. For the Commission to act otherwise would be to ignore the ties which linked it to the General Assembly and to disregard its duties towards that body.

11. Other members of the Commission were of the opinion that the logical interpretation of paragraph 2 of article 18 was that the Commission, having selected a topic, was competent to proceed with the work of codification of that topic, in accordance with articles 18 to 22 of the Statute, unless otherwise directed by the General Assembly. Only after having completed this work would the Commission make recommendations to the

General Assembly in one or other of the modes prescribed in article 23, paragraph 1, of the Statute. It was also argued that the Commission was not obliged to await the response of the General Assembly to its recommendations respecting the selection of topics before beginning work upon those whose codification was considered necessary or desirable.

12. The question at issue was summed up by the Chairman and put to the Commission in the following terms: "Has the Commission competence to proceed under articles 19 to 23 without awaiting action by the General Assembly on recommendations made by the Commission under article 18, paragraph 2?" By ten votes to three, the Commission decided in the affirmative.

SURVEY OF INTERNATIONAL LAW

13. In undertaking a survey of the whole field of international law with a view to selecting topics for codification, in accordance with article 18, paragraph 1, of the Statute, the Commission conceived the task as one calling for a general review of the topics of international law. The primary purpose was to select particular topics the codification of which the Commission considered necessary or desirable; the survey of the whole field of international law was merely the logical means of making the selection. In this connexion, the Commission had before it a memorandum entitled *Survey of International Law in relation to the Work of Codification of the International Law Commission*,⁴ submitted by the Secretary-General. This memorandum surveys the field of the international law of peace and, in the opinion of the majority of the Commission, enumerates in a comprehensive and satisfactory way topics in that field.

THE QUESTION OF A GENERAL PLAN OF CODIFICATION

14. The Commission discussed the question whether a general plan of codification, embracing the entirety of international law, should be drawn up. Those who favoured this course had in view the preparation at the outset of a plan of a complete code of public international law, into the framework of which topics would be inserted as they were codified. The sense of the Commission was that, while the codification of the whole of international law was the ultimate objective, it was desirable for the present to begin work on the codification of a few of the topics, rather than to discuss a general systematic plan which might be left to later elaboration.

TOPICS OF INTERNATIONAL LAW CONSIDERED BY THE COMMISSION

15. Using the memorandum of the Secretary-General as a basis of discussion, the Commission reviewed, consecutively, the following topics:

- (1) Subjects of international law;
- (2) Sources of international law;

⁴ A/CN.4/1/Rev.1.

- (3) Obligations of international law in relation to the law of States;
- (4) Fundamental rights and duties of States;
- (5) Recognition of States and Governments;
- (6) Succession of States and Governments;
- (7) Domestic jurisdiction;
- (8) Recognition of acts of foreign States;
- (9) Jurisdiction over foreign States;
- (10) Obligations of territorial jurisdiction;
- (11) Jurisdiction with regard to crimes committed outside national territory;
- (12) Territorial domain of States;
- (13) Regime of the high seas;
- (14) Regime of territorial waters;
- (15) Pacific settlement of international disputes;
- (16) Nationality, including statelessness;
- (17) Treatment of aliens;
- (18) Extradition;
- (19) Right of asylum;
- (20) Law of treaties;
- (21) Diplomatic intercourse and immunities;
- (22) Consular intercourse and immunities;
- (23) State responsibility;
- (24) Arbitral procedure;
- (25) Laws of war.

TOPICS OF INTERNATIONAL LAW PROVISIONALLY SELECTED BY THE COMMISSION

16. After due deliberation, the Commission drew up a provisional list of fourteen topics selected for codification, as follows:

- (1) Recognition of States and Governments;
- (2) Succession of States and Governments;
- (3) Jurisdictional immunities of States and their property;
- (4) Jurisdiction with regard to crimes committed outside national territory;
- (5) Regime of the high seas;
- (6) Regime of territorial waters;
- (7) Nationality, including statelessness;
- (8) Treatment of aliens;
- (9) Right of asylum;
- (10) Law of treaties;
- (11) Diplomatic intercourse and immunities;
- (12) Consular intercourse and immunities;
- (13) State responsibility;
- (14) Arbitral procedure.

17. It was understood that the foregoing list of topics was only provisional and that additions or deletions might be made after further study by the Commission or in compliance with the wishes of the General Assembly.

LAWS OF WAR

18. The Commission considered whether the laws of war should be selected as a topic for codification. It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant. On the other hand, the opinion was expressed that, although the term "laws of war" ought to be discarded, a study of the rules governing the use of armed force—legitimate or illegitimate—might be useful. The punishment of war crimes, in accordance with the principles of the Charter and judgment of the Nürnberg Tribunal, would necessitate a clear definition of those crimes and, consequently, the establishment of rules which would provide for the case where armed force was used in a criminal manner.

The majority of the Commission declared itself opposed to the study of the problem at the present stage. It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.

PRIORITY OF TOPICS

19. Having provisionally selected fourteen topics for codification, the Commission next considered which of these should be studied first. One suggestion was that priority should be given to the question of the regime of the high seas, statelessness, and consular intercourse and immunities. Another was that the questions of the law of treaties and of arbitral procedure should be given priority. A third stressed the importance of the question of nationality and statelessness, and a fourth that of the right of asylum.

20. The Commission finally decided to give priority to the following three topics:

- (1) Law of treaties;
- (2) Arbitral procedure;
- (3) Regime of the high seas.

ELECTION OF RAPORTEURS

21. The foregoing three topics were entrusted to three rapporteurs, each of whom was to prepare a working paper for submission to the Commission at its second session. The rapporteurs elected by the Commission are:

- Mr. James L. Brierly (law of treaties);
- Mr. Georges Scelle (arbitral procedure);
- Mr. J. P. A. François (regime of the high seas).

REQUEST TO GOVERNMENTS FOR DATA

22. Pursuant to the provisions of article 19, paragraph 2, of its Statute, the Commission decided that a request should be addressed to Governments to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the foregoing three topics. The rapporteurs were invited to prepare, in consultation with the Chairman of the Commission and the Secretary-General, the terms of the request which would be sent to the Governments in the name of the Commission through the Secretary-General.⁵

THE TOPIC OF THE RIGHT OF ASYLUM

23. During the discussion on the draft Declaration on Rights and Duties of States, a proposal was submitted by Mr. Ricardo J. Alfaro, Mr. Georges Scelle and Mr. Jesús M. Yepes to include in the draft Declaration an article relating to the right of asylum.⁶ It was finally decided not to include such an article.⁷ Mr. Jesús M. Yepes was subsequently invited to prepare a working paper on this topic, for submission to the Commission at its second session.

CHAPTER III

Formulation of the Nürnberg Principles and Preparation of a Draft Code of Offences Against the Peace and Security of Mankind

RESOLUTION 177 (II) ADOPTED BY THE GENERAL ASSEMBLY

24. The General Assembly, at its 123rd meeting on 21 November 1947, adopted resolution 177 (II) which reads as follows:

"The General Assembly

"Decides to entrust the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174 (II), be elected at the next session of the General Assembly, and

"Directs the Commission to

"(a) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and

"(b) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above."

⁵ Mr. Vladimir M. Koretsky opposed this decision on the ground that the Commission, pursuant to articles 18 and 19 of its Statute, was empowered to address requests to Governments only after approval by the General Assembly of the Commission's recommendations as to the topics selected.

⁶ A/CN.4/SR.16, page 15.

⁷ A/CN.4/SR.20, page 20.

FORMULATION OF THE NÜRNBERG PRINCIPLES

25. The Secretary-General had submitted to the Commission a memorandum entitled *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*.⁸ This memorandum contained: (a) a survey of the Charter of the Nürnberg Tribunal and of the trial before the Tribunal; (b) an account of the deliberations in the United Nations concerning the formulation of the principles of international law recognized in the Charter and judgment of the Tribunal; (c) an analysis of the judgment of the Tribunal; and (d) as an addendum, a note on the trial of major war criminals before the International Military Tribunal for the Far East.

26. The wording of resolution 177 (II) of the General Assembly directing the Commission to "formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal" gave rise to some doubt as to the exact scope of the task assigned to the Commission. The question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and judgment constituted principles of international law. The conclusion of the Commission was that, since the Nürnberg principles had been affirmed by the General Assembly in resolution 95 (I) of 11 December 1946, the task of the Commission was not to express any appreciation of these principles as principles of international law but merely to formulate them. Furthermore, the Commission was of the opinion that it should not concern itself with those provisions of the Charter of the Tribunal relating to procedural matters. Its task was to formulate principles of a substantive character, and in particular those embodied in articles 6, 7 and 8 of the Charter of the Tribunal.

27. The Commission also considered the question whether, in formulating the principles of international law recognized in the Charter and judgment of the Tribunal, it should also formulate the general principles of international law which underlie the Charter and judgment. Mr. Georges Scelle advocated the latter course and in furtherance thereof presented a set of draft principles.⁹ The majority of the Commission, however, took the contrary view and were therefore unable to accept certain of the principles enunciated by Mr. Scelle which, in their opinion, went beyond the scope of the task of the Commission.

28. The Commission appointed a sub-committee, composed of Mr. J. P. A. François, Mr. A. E. F. Sandström and Mr. Jean Spiropoulos, which submitted a working paper¹⁰ containing a formulation of the Nürnberg principles. After a careful consideration of this working paper, the Commission retained tentatively a number of draft articles and referred them back

⁸ A/CN.4/5.

⁹ A/CN.4/W.11.

¹⁰ A/CN.4/W.6.

to the Sub-Committee for redrafting. The Sub-Committee thereafter presented a further draft¹¹ to the Commission.¹²

29. In considering what action should be taken with respect to the further draft submitted by the Sub-Committee, the Commission took into account its terms of reference as laid down in General Assembly resolution 177 (II). It noted that, thereunder, the task of formulating the Nürnberg principles appeared to be so closely connected with that of preparing a draft code of offences against the peace and security of mankind that it would be premature for the Commission to give a final formulation to these principles before the work of preparing the draft code was further advanced. It was, accordingly, decided to refer the further draft to a rapporteur who should submit his report thereon to the Commission at its second session.

PREPARATION OF A DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

30. The Commission next considered the question of the preparation of a draft code of offences against the peace and security of mankind, in pursuance of General Assembly resolution 177 (II), quoted above. The Commission decided that a rapporteur should be appointed to prepare a working paper on the subject and to submit it to the Commission at its second session. It was also decided that a questionnaire should be circulated to Governments inquiring what offences, apart from those defined in the Charter and judgment of the Nürnberg Tribunal, should, in their view, be comprehended in the draft code envisaged in the aforementioned resolution of the General Assembly.

ELECTION OF RAPPOREUR

31. At a subsequent meeting the Commission appointed Mr. Jean Spiropoulos rapporteur to continue the work of the Commission with respect to: (a) the formulation of the principles of international law recognized in the Charter and judgment of the Nürnberg Tribunal; and (b) the preparation of a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. It was understood that the rapporteur should present to the Commission at its second session a report on the Nürnberg principles and a working paper on the draft code.

CHAPTER IV

Study of the Question of International Criminal Jurisdiction

32. In pursuance of resolution 260 (III) B of the General Assembly, the Commission began a preliminary study of the desirability and possibility

¹¹ A/CN.4/W.12.

¹² With regard to this further draft, Mr. Georges Scelle declared that he was unable to associate himself with it.

of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions. This resolution, adopted at the 179th meeting, on 9 December 1948, reads as follows:

"The General Assembly,

"Considering that the discussion of the Convention on the Prevention and Punishment of the Crime of Genocide has raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal,

"Considering that, in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law,

"Invites the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions;

"Requests the International Law Commission, in carrying out this task, to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice."

33. The Secretary-General had submitted to the Commission a memorandum entitled *Historical Survey of the Question of International Criminal Jurisdiction*.¹³ This memorandum gave a factual account of the consideration of the question of an international criminal jurisdiction from the Peace Conference of 1919 up to and including the adoption of the above-quoted resolution by the General Assembly.

34. After a preliminary discussion, the Commission decided to appoint Mr. Ricardo J. Alfaro and Mr. A. E. F. Sandström rapporteurs on this subject. The rapporteurs were requested to make a study of the question, and to submit to the Commission at its second session one or more working papers thereon.

CHAPTER V

Ways and Means for Making the Evidence of Customary International Law More Readily Available

35. In accordance with article 24 of its Statute, the Commission began the consideration of ways and means for making the evidence of customary international law more readily available. In this connexion, the Secretary-General had submitted to the Commission a memorandum entitled *Ways and Means of making the Evidence of Customary International Law more readily available*,¹⁴ and a working paper¹⁵ based thereon.

36. The Commission had a discussion on the basis of the documents before it. Attention was given to the two methods of making the evidence

¹³ A/CN.4/7.

¹⁴ A/CN.4/6.

¹⁵ A/CN.4/W.9.

of customary international law more readily available mentioned as examples in article 24 of the Statute—the collection and publication of documents concerning State practice, and the collection of decisions of national and international courts on questions of international law. The possibility of assembling texts of national legislation relevant to international law was also considered.

37. As a result of the discussion, the Chairman of the Commission was invited to prepare a working paper on the subject. The Chairman acceded to this suggestion, and undertook to present a paper to the Commission at its next session.

CHAPTER VI

Co-operation With Other Bodies

38. With reference to item 6 of its agenda, the Commission discussed whether it was necessary at its first session to take any decision in regard to consultation with any of the organs of the United Nations or with international or national organizations, as envisaged in article 26, paragraph 1, of its Statute. The sense of the Commission was that consideration of this question should be postponed to its next session.

39. The Commission examined a tentative list of international and national organizations concerned with questions of international law, prepared by the Secretary-General in accordance with article 26, paragraphs 2 and 3, of the Statute, for the purpose of distribution of documents of the Commission.¹⁸

Mr. Vladimir M. Koretsky was of the opinion that paragraphs 1 and 2 of article 26 of the Statute of the Commission were closely related and that the inclusion of any organization in the list referred to in paragraph 2 would mean that the Commission might wish to consult with such organization. The majority of the Commission, however, decided that paragraphs 1 and 2 were not related, and that the list referred to in paragraph 2 was only for the purpose of distribution of documents.

Some members proposed additions to this list and it was understood that further additions could be made at any time. The Commission took note of a statement by the representative of the Secretary-General that the Secretariat would continue its efforts to secure further information so that national organizations of all Member States might be included.

CHAPTER VII

Miscellaneous Decisions

DATE AND PLACE OF THE SECOND SESSION

40. The Commission decided to hold only one session in 1950. After consultation with the Secretary-General, it was decided that the session

¹⁸ A/CN.4/8 (International and National Organizations concerned with Questions of International Law: tentative list).

would be held in Europe, at Geneva. The opening meeting of the session, which is scheduled for a maximum period of ten weeks, will take place towards the end of May 1950.

REPRESENTATION AT THE GENERAL ASSEMBLY

41. The Commission decided that it would be represented, for purposes of consultation, by its Chairman during the fourth regular session of the General Assembly.

EMOLUMENTS FOR MEMBERS OF THE COMMISSION

42. In the view of the majority of the Commission, experience has shown that the *per diem* allowance provided for under article 13 of the Statute of the Commission, is hardly sufficient to meet the living expenses of members. Assuming that the Commission will be in session for at least two months each year, its work will entail for each of the members the sacrifice of a substantial part of his income; for those members who are asked to serve as rapporteurs and as such to do extensive work in the interim between sessions of the Commission, it would involve an even greater sacrifice.

Since, in fact, most members are dependent on their current earnings, it would be in the interest of the work of the Commission, in order to enable the time of its members to be enlisted in this work, that methods should be explored by which service in the Commission may be made less onerous financially. To this end, the General Assembly may wish to reconsider the terms of article 13 of the Statute of the Commission.

ACKNOWLEDGMENT OF THE WORK OF THE SECRETARIAT

43. The Commission wishes to thank the Secretary-General for the services rendered to it and to congratulate the Legal Department of the Secretariat on its untiring efforts in assisting the Commission and on the valuable working documents placed at the disposal of the Commission.

PART II: DRAFT DECLARATION ON RIGHTS AND DUTIES OF STATES

RESOLUTION 178 (II) ADOPTED BY THE GENERAL ASSEMBLY

44. The General Assembly, at its 123rd meeting, on 21 November 1947, adopted resolution 178 (II) which reads as follows:

"The General Assembly,

"Noting that very few comments and observations on the draft declaration on the rights and duties of States presented by Panama have been received from the States Members of the United Nations,

"Requests the Secretary-General to draw the attention of States to the desirability of submitting their comments and observations without delay;

"Requests the Secretary-General to undertake the necessary preparatory work on the draft declaration on the rights and duties of States according to the terms of resolution 175 (II);

"Resolves to entrust further study of this problem to the International Law Commission, the members of which in accordance with the terms of resolution 174 (II) will be elected at the next session of the General Assembly;

"And accordingly

"Instructs the International Law Commission to prepare a draft declaration on the rights and duties of States, taking as a basis of discussion the draft declaration on the rights and duties of States presented by Panama, and taking into consideration other documents and drafts on this subject."

PREPARATION BY THE COMMISSION OF THE DRAFT DECLARATION

45. In conformity with the resolution of the General Assembly set out in the foregoing paragraph, the Commission took as the basis of its discussions the draft Declaration on the Rights and Duties of States presented by Panama.¹⁷ The task of the Commission was facilitated by a memorandum submitted by the Secretary-General containing a detailed analysis of the United Nations discussions on this subject, and reproducing comments and observations communicated by Member States on the Panamanian draft,¹⁸ the texts of treaties and conventions, resolutions, declarations and projects emanating from inter-governmental bodies, declarations prepared by non-governmental organizations and scientific institutions, and statements by jurists and publicists.¹⁹ The Commission examined article by article the Panamanian draft in the light of other documents before it. Its deliberations are recorded in its summary records.²⁰

46. The draft Declaration prepared by the Commission was subjected to three readings. Each of the articles finally adopted was discussed at

¹⁷ A/285.

¹⁸ Comments and observations on the Panamanian draft were made by the following Governments: Canada (12 May 1947, 19 July 1947 and 7 April 1948); Czechoslovakia (11 August 1947); Denmark (22 September 1947); Dominican Republic (4 June 1947); Ecuador (17 September 1947); El Salvador (28 April 1947); Greece (4 September 1947); India (26 September 1947 and 11 June 1948); Mexico (7 June 1947); Netherlands (23 June 1947); New Zealand (25 July 1947 and 9 April 1948); Philippines (19 December 1947 and 27 May 1948); Sweden (30 May 1947 and 26 April 1948); Turkey (14 August 1947); United Kingdom (1 May 1947 and 24 August 1948); United States of America (29 May 1947 and 11 March 1949); Venezuela (12 September 1947).

¹⁹ A/CN.4/2 (Preparatory Study concerning a Draft Declaration on the Rights and Duties of States).

²⁰ A/CN.4/SR.7 to A/CN.4/SR.16, A/CN.4/SR.19 to A/CN.4/SR.25, A/CN.4/SR.29 and A/CN.4/SR.30.

each reading, and the sense of the Commission was taken on its retention. Though views varied on the different articles, those which were retained met in each case with preponderant support of the members of the Commission. The draft Declaration as a whole was finally adopted by eleven votes to two.²¹

DRAFT DECLARATION ON RIGHTS AND DUTIES OF STATES

Whereas the States of the world form a community governed by international law,

Whereas the progressive development of international law requires effective organization of the community of States,

Whereas a great majority of the States of the world have accordingly

²¹ A/CN.4/SR.25. After the vote on the draft Declaration, Mr. Vladimir M. Koretsky and Mr. Manley O. Hudson, who voted against it, made statements in explanation of their votes.

Mr. Koretsky declared that he voted against the draft declaration because of its many shortcomings including, in particular: (1) that it deviated from such fundamental principles of the United Nations as the sovereign equality of all the Members thereof and the right of self-determination of peoples; (2) that it did not protect the interests of States against interference by international organizations or groups of States in matters falling essentially within their domestic jurisdiction; (3) that it did not set out the most important duty of States to take measures for the maintenance of international peace and security, the prohibition of atomic weapons, and the general reduction of armaments and armed forces, and that, further, the draft Declaration did not proclaim the duty of States to abstain from participation in any aggressive blocs such as the North Atlantic Pact and the Western Union, which under the cloak of false phrases concerning peace and self-defence were actually aimed at preparing new wars; (4) that the draft Declaration ignored the most important duty of States to take measures for the eradication of the vestiges of fascism and against the danger of its resurgence; (5) that the draft Declaration ignored the most important duty of States not to allow the establishment of any direct or indirect restriction of the rights of citizens or the establishment of direct or indirect privileges for citizens on account of their race or nationality, and not to allow any advocacy of racial or national exclusiveness or of hatred and contempt; (6) that the draft Declaration did not recite the most important duty of States to ensure the effectiveness of fundamental freedoms and human rights, notably the right to work and the right to be protected against unemployment, ensured on the part of the State and society by such measures as would provide wide possibilities for all to participate in useful work and as would prevent unemployment. Mr. Koretsky added that the draft Declaration, and especially article 14 thereof, went even further than the Panamanian draft in denying the sovereignty of States. In his view the doctrine of the "super-State" was being resorted to in this fashion by persons or peoples seeking to achieve, or to help others to achieve, world domination. Instead of reinforcing the principles of sovereignty, self-determination, sovereign equality of States, independence, and the freedom of States from dependence upon other States, the draft Declaration, he thought, derogated from the great movements to rid the peoples of the world of the scourges of exploitation and oppression (A/CN.4/SR.22, pages 13-14).

Mr. Hudson stated that he voted against the draft Declaration because the provisions of its article 6 went beyond the Charter of the United Nations, and beyond international law at its present stage of development (A/CN.4/SR.25, pages 3 and 6).

established a new international order under the Charter of the United Nations, and most of the other States of the world have declared their desire to live within this order,

Whereas a primary purpose of the United Nations is to maintain international peace and security, and the reign of law and justice is essential to the realization of this purpose, and

Whereas it is therefore desirable to formulate certain basic rights and duties of States in the light of new developments of international law and in harmony with the Charter of the United Nations,

The General Assembly of the United Nations adopts and proclaims this *Declaration on Rights and Duties of States*

The draft Declaration as drawn up by the Commission reads as follows:

ARTICLE 1

Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government.

This text was derived from articles 3 and 4 of the Panamanian draft.

ARTICLE 2

Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law.

This text was derived from article 7 of the Panamanian draft. The concluding phrase is a safeguard for protecting such immunities as those of diplomatic officers and officials of international organizations. Reference was made in the discussions to Article 105 of the Charter of the United Nations, and to the more recent implementation of that Article.

ARTICLE 3

Every State has the duty to refrain from intervention in the internal or external affairs of any other State.

The substance of this text, which was derived from article 5 of the Panamanian draft, has already found place in various international conventions.

ARTICLE 4

Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife.

This text was derived from article 22 of the Panamanian draft. The principle has been enunciated in various international agreements.

ARTICLE 5

Every State has the right to equality in law with every other State.

This text was derived from article 6 of the Panamanian draft. It expresses, in the view of the majority of the Commission, the meaning of the phrase "sov-

oreign equality'' employed in Article 2 (1) of the Charter of the United Nations as interpreted at the San Francisco Conference, 1945.²²

ARTICLE 6

Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion.

This text was derived from the latter part of article 21 of the Panamanian draft. The reference to human rights and fundamental freedoms is inspired by Article 1 (3), Article 13, paragraph 1 (b), Article 55 (c), and Article 76 (c), of the Charter of the United Nations and by the Universal Declaration of Human Rights.

ARTICLE 7

Every State has the duty to ensure that conditions prevailing in its territory do not menace international peace and order.

This text was derived from the introductory part of article 21 of the Panamanian draft.

ARTICLE 8

Every State has the duty to settle its disputes with other States by peaceful means in such a manner that international peace and security, and justice, are not endangered.

This text was derived from article 15 of the Panamanian draft. Its language follows closely Article 2 (3) of the Charter of the United Nations.

ARTICLE 9

Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order.

This text was derived from article 16 of the Panamanian draft. The first phrase is fashioned upon a provision in the Treaty of Paris for the Renunciation of War of 1928. The second phrase follows closely the provision in Article 2 (4) of the Charter of the United Nations.

ARTICLE 10

Every State has the duty to refrain from giving assistance to any State which is acting in violation of article 9, or against which the United Nations is taking preventive or enforcement action.

This text was derived from article 19 of the Panamanian draft. The second phrase follows closely the language employed in the latter part of Article 2 (5) of the Charter of the United Nations.

²² Report of Committee 1 to Commission I, Documents of the San Francisco Conference, VI, page 457.

ARTICLE 11

Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of article 9.

This text was derived from article 18 of the Panamanian draft.

ARTICLE 12

Every State has the right of individual or collective self-defense against armed attack.

This text was derived from article 17 of the Panamanian draft. The language is based upon that employed in Article 51 of the Charter of the United Nations.

ARTICLE 13

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.

This text was derived from articles 11 and 12 of the Panamanian draft. The phrase "treaties and other sources of international law" was borrowed from the Preamble of the Charter of the United Nations. The first phrase is a re-statement of the fundamental principle *pacta sunt servanda*. The concluding phrase reproduces the substance of a well-known pronouncement by the Permanent Court of International Justice.²³

ARTICLE 14

Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.

This text was derived from article 13 of the Panamanian draft.

GUIDING CONSIDERATIONS

47. During the preparation of the foregoing draft Declaration, the Commission took into account certain guiding considerations. It was felt that the draft Declaration should be in harmony with the provisions of the Charter of the United Nations: that it should be applicable only to sovereign States; that it should envisage all the sovereign States of the world and not only the Members of the United Nations; and that it should embrace certain basic rights and duties of States.

SUMMARY OF CONTENTS

48. In conformity with these considerations, the Commission restricted the draft Declaration to the statement of four rights and ten duties of

²³ Permanent Court of International Justice, Series A/B, Judgments, Orders and Advisory Opinions, Fascicule No. 44, page 24.

States. The rights are those of independence, comprehending the right of the State to exercise freely all its legal powers, including the choice of its form of government; of jurisdiction over State territory in accordance with international law; of equality in law; and of self-defence, individual or collective, against armed attack. The duties which are stated are of necessity expressed at greater length. They include the duty of the State to conduct its international relations in accordance with international law and to observe its legal obligations. They also include the duty to settle disputes by peaceful means and in accordance with law and justice, and to refrain from intervention and from resorting to war or other illegal use of force. The duties of refraining from assisting any State resorting to war or other illegal use of force, or any State against which the United Nations is taking preventive or enforcement action, and of refraining from recognizing any territorial acquisition resulting from war or other illegal use of force, are likewise stated as corollaries of the foregoing. And, finally, there are set out the duties of the State to refrain from fomenting civil strife in the territory of other States and to prevent the organized incitement thereof from within its own territory; to ensure in general that conditions in its territory do not menace international peace and order; and to treat all persons within its jurisdiction with due respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion.

OBSERVATIONS CONCERNING THE DRAFT DECLARATION

49. It will be noted that each of the fourteen articles of the Commission's draft was derived from an article in the Panamanian draft. Some of the twenty-four articles of the latter were not retained; some were combined with other articles; some were found to be unnecessary because their substance was contained in other articles. Two of the articles in the Panamanian draft which were not retained precipitated a lengthy discussion which it may be useful to review.

The Commission concluded that no useful purpose would be served by an effort to define the term "State," though this course had been suggested by the Governments of the United Kingdom and of India. In the Commission's draft, the term "State" is used in the sense commonly accepted in international practice. Nor did the Commission think that it was called upon to set forth in this draft Declaration the qualifications to be possessed by a community in order that it may become a State.

It was proposed that the draft Declaration should be introduced by an article providing that "Each State has the right to exist and to preserve its existence." This was urged as a mainspring for other rights to be declared, and its importance was thought to be underscored because the right had been denied and trampled upon by the Axis Powers in the last

war. On the other hand, a majority of the members of the Commission deemed it to be tautological to say that an existing State has the right to exist; that right is in a sense a postulate or presupposition underlying the whole draft Declaration. They also thought it superfluous to declare the right of a State to preserve its existence in view of articles in the draft Declaration concerning self-defence and non-intervention by other States.

50. Another proposed article would have provided that "Each State has the right to have its existence recognized by other States." The supporters of this proposal took the view that, even before its recognition by other States, a State has certain rights in international law; and they urged that, when another State on an appraisal made in good faith considers that a political entity has fulfilled the requirements of statehood, it has a duty to recognize that political entity as a State; they appreciated, however, that, in the absence of an international authority with competence to effect collective recognition, each State would retain some freedom of appraisal until recognition had been effected by the great majority of States. On the other hand, a majority of the members of the Commission thought that the proposed article would go beyond generally accepted international law in so far as it applied to new-born States; and that in so far as it related to already established States the article would serve no useful purpose. The Commission concluded that the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration, and it noted that the topic was one of the fourteen topics the codification of which has been deemed by the Commission to be necessary or desirable.

51. After the draft Declaration was completed, Mr. Shuhsi Hsu proposed the addition of an article on the duty of States to condition military necessity by the principle of humanity in the employment of armed forces, legitimate or illegitimate. Some members objected, holding that no reference to warfare should find a place in such a Declaration as drafted. The Commission did not accept the proposed addition.

52. In conclusion, it will be observed that the rights and duties set forth in the draft Declaration are formulated in general terms, without restriction or exception, as befits a declaration of basic rights and duties. The articles of the draft Declaration enunciate general principles of international law, the extent and the modalities of the application of which are to be determined by more precise rules. Article 14 of the draft Declaration is a recognition of this fact. It is, indeed, a global provision which dominates the whole draft and, in the view of the Commission, it appropriately serves as a key to other provisions of the draft Declaration in preclaiming "the supremacy of international law."

SUBMISSION OF THE DRAFT DECLARATION TO THE GENERAL ASSEMBLY

53. The Commission gave careful consideration to the question of the procedure to be followed with respect to the draft Declaration, and in particular to the question whether or not the latter should be submitted immediately to the General Assembly. In this connexion, the Commission was guided by the terms of General Assembly resolution 178 (II) and the relevant provisions of its own Statute. It also took into account the terms of a similar resolution, namely, resolution 260 (III) B of the General Assembly, whereunder it was assigned the special task of studying the question of an international criminal jurisdiction.

The Commission, with Mr. Vladimir M. Koretsky dissenting, came to the conclusion that its function in relation to the draft Declaration fell within neither of the two principal duties laid upon it by its Statute, but constituted a special assignment from the General Assembly. It was within the competence of the Commission to adopt in relation to this task such a procedure as it might deem conducive to the effectiveness of its work. In this connexion, it was noted that the Panamanian draft, which had served as a basis of discussion, had, in pursuance of resolution 38 (I) adopted by the General Assembly on 11 December 1946, already been transmitted to the Governments of all Members of the United Nations with a request for comments and observations; it was also noted that this request had been reinforced by a circular letter issued by the Secretary-General in pursuance of General Assembly resolution 178 (II) adopted on 21 November 1947. All Governments had thus had ample opportunity to express their general views on the subject matter and, moreover, all Members of the United Nations would have another opportunity so to do when the General Assembly came to consider the draft Declaration.

The Commission therefore decided, by twelve votes to one, to submit the draft Declaration, through the Secretary-General, to the General Assembly immediately, and to place on record its conclusion that it was for the General Assembly to decide what further course of action should be taken in relation to the draft Declaration and, in particular, whether it should be transmitted to Member Governments for comments.

Mr. Vladimir M. Koretsky dissented from this view, expressing the opinion that articles 16 and 21 of the Statute of the Commission required the publication of any draft prepared by the Commission together with such explanations and supporting material as the Commission might consider appropriate, and the circulation thereof to Governments with a request for observations to be made within a reasonable time, before the final submission of any document to the General Assembly.

NORTH ATLANTIC COUNCIL

COMMUNIQUE¹

I

The Council established by Article 9 of the North Atlantic Treaty held its first session in Washington on September 17, 1949. Representatives of the Parties to the Treaty attending this first session were: For Belgium, the Minister of Foreign Affairs, M. Paul van Zeeland; for Canada, the Secretary of State for External Affairs, Mr. Lester B. Pearson; for Denmark, the Minister of Foreign Affairs, Mr. Gustav Rasmussen; for France, the Minister of Foreign Affairs, M. Robert Schuman; for Iceland, the Minister to the United States, Mr. Thor Thors; for Italy, the Minister of Foreign Affairs, Count Sforza; for Luxembourg, the Minister of Foreign Affairs, Mr. Josef Bech; for the Netherlands, the Minister of Foreign Affairs, Mr. Dirk U. Stikker; for Norway, the Minister of Foreign Affairs, Mr. Halvard M. Lange; for Portugal, the Minister of Foreign Affairs, Mr. José Caeiro da Matta; for the United Kingdom, the Secretary of State for Foreign Affairs, Mr. Ernest Bevin; for the United States, the Secretary of State, Mr. Dean Acheson.

The task of the Council is to assist the Parties in implementing the Treaty and particularly in attaining its basic objective. That objective is to assist, in accordance with the Charter, in achieving the primary purpose of the United Nations—the maintenance of international peace and security. The Treaty is designed to do so by making clear the determination of the Parties collectively to preserve their common heritage of freedom and to defend themselves against aggression while emphasizing at the same time their desire to live in peace with all governments and all peoples.

It is in this spirit that the Foreign Ministers of the Parties have met in Washington and have taken steps to implement the Treaty. The meetings of the Council showed that all Parties are united in their resolve to integrate their efforts for the promotion of lasting peace, the preservation of their common heritage and the strengthening of their common defense.

The main purpose of the Council during this first session was to provide for its own future operation and, in accordance with Article 9, to establish a Defense Committee and such other subsidiary bodies as are deemed necessary to assist the Council in considering matters concerning the implementation of the North Atlantic Treaty.

II. ORGANIZATION

The Council is the principal body in the North Atlantic Treaty Organization. In accordance with the Treaty, the Council is charged with the

¹ Department of State Press Release No. 720, Sept. 17, 1949; Bulletin, Vol. XXI, No. 534 (Sept. 26, 1949), p. 469.

responsibility of considering all matters concerning the implementation of the provisions of the Treaty. Such subsidiary bodies as are set up under Article 9 of the Treaty are subordinate to the Council.

The organization established under the North Atlantic Treaty should be operated with as much flexibility as possible and be subject to review from time to time. The establishment of this machinery does not preclude the use of other means for consultation and coöperation between any or all of the Parties on matters relating to the Treaty.

III. COUNCIL

As regards its own organization, the Council agreed as follows:

As decided on April 2, the Council will normally be composed of Foreign Ministers. Should the latter be unable to attend, their places shall be taken by plenipotentiary representatives designated by the Parties. To enable the Council to meet promptly at any time the diplomatic representatives in Washington of the Parties shall be empowered to act as their Governments' representatives whenever necessary.

Terms of Reference

The North Atlantic Treaty shall constitute the terms of reference of the Council.

Time and Frequency of Sessions

The Council shall be convened by the Chairman and shall meet in ordinary session annually and at such other times as may be deemed desirable by the majority of the Parties. Extraordinary sessions under Articles 4 and 5 of the Treaty may be called at the request of any Party invoking one of these Articles.

Location of the Council Sessions

The location of each session of the Council shall be determined by the Chairman after consultation with the other members of the Council. For general convenience the ordinary annual session should normally be held at about the same time and in the same general geographical area as the annual session of the General Assembly. Other ordinary sessions should whenever practicable be held at some convenient location in Europe.

Chairmanship

Chairmanship shall be held in turn by the Parties according to the alphabetical order in the English language beginning with the United States. Each Party shall hold the office from the beginning of one ordinary annual session until the appointment of the new Chairman at the following ordinary annual session. If any Party does not wish to accept the Chairmanship, it shall pass to the next Party in alphabetical order.

Languages

English and French shall be the official languages for the entire North Atlantic Treaty Organization.

Permanent Coördination

Additional political bodies shall not be established unless and until experience has demonstrated their need. However, the existing informal arrangement for consultation between representatives in Washington of the Parties shall be maintained.

IV. DEFENSE COMMITTEE

The Council established a Defense Committee.

The Council reaffirmed that ensuring the security of the North Atlantic area is a primary objective of the North Atlantic Treaty and is vital to the security of each of the Parties. It is therefore of paramount importance that the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, maintain and develop their individual and collective capacity to resist armed attack. The Defense Committee should therefore immediately take the requisite steps to have drawn up unified defense plans for the North Atlantic area.

As regards the organization of the Defense Committee, the Council agreed as follows:

The Defense Committee will be composed of one representative from each Party. These representatives will normally be Defense Ministers. In any case where this is not possible, another representative may be designated.

Terms of Reference

The Defense Committee shall recommend measures for the implementation of Articles 3 and 5 in accordance with general policy guidance given by the Council.

Time and Frequency of Sessions

The Defense Committee shall be convened by the Chairman and shall meet in ordinary session annually and at such other times as it may be requested to meet by the Council or as may be deemed desirable by the majority of the members of the Defense Committee.

Location

The location of each session of the Defense Committee shall be determined by the Chairman in consultation with the members of the Committee.

Chairmanship

Chairmanship shall be held in turn by the Parties according to the alphabetical order in the English language beginning with the United States. Each Party shall hold the office from the beginning of one ordinary annual session until the appointment of the new Chairman at the following ordinary annual session. If any Party does not wish to accept the Chairmanship, it shall pass to the next Party in alphabetical order.

* * * * *

The Council suggested to the Defense Committee the general outline of those subsidiary military bodies which it considered appropriate for the task of aiding the Defense Committee in recommending measures for the implementation of Articles 3 and 5 of the Treaty. The Defense Committee was invited, among other things, to consider the question of these subsidiary bodies in detail and to elaborate on the general provisions suggested by the Council for each body.

* * * * *

The Council suggested in general terms that the military organization should include the following:

V. MILITARY COMMITTEE

The Defense Committee should establish a Military Committee composed of one military representative from each Party. These representatives should be Chiefs of Staff or their representatives. (Iceland, having no military establishment, may, if it so desires, be represented by a civilian official.)

Terms of Reference

The Military Committee should:

- provide general policy guidance of a military nature to its Standing Group;

- advise the Defense Committee and other agencies on military matters as appropriate;

- recommend to the Defense Committee military measures for the unified defense of the North Atlantic area.

Location

The Military Committee should normally meet in Washington.

Standing Group

In order to facilitate the rapid and efficient conduct of the work of the Military Committee, there should be set up a sub-committee of that body

to be known as the "Standing Group." The Standing Group should be composed of one representative each of France, the United Kingdom, and the United States.

Terms of Reference

The Standing Group, in accordance with general policy guidance provided by the Military Committee, should provide such specific policy guidance and information of a military nature to the Regional Planning Groups and any other bodies of the organization as is necessary for their work.

To achieve the unified defense of the North Atlantic area, the Standing Group should coördinate and integrate the defense plans originating in the Regional Planning Groups, and should make appropriate recommendations thereon to the Military Committee.

The Standing Group should recommend to the Military Committee those matters on which the Standing Group should be authorized to take action in the name of the Military Committee within the framework of approved policy.

It is recognized that it is the responsibility of individual governments to provide for the implementation of plans to which they have agreed. It is further recognized that it is the primary responsibility of the Regional Planning Groups to prepare plans for the defense of their respective regions. Subject to these principles, it is understood that before the Standing Group makes recommendations on any plan or course of action involving the use of forces, facilities, or resources of a Party not represented on the Standing Group, going beyond or differing from arrangements previously agreed by the Party concerned, the Party should have the right to participate in the Standing Group in the work of formulating such recommendations. It is also understood that when communicating their regional plans to the Standing Group, the Regional Planning Groups should be entitled to have their plans presented and explained by any one of their members and not necessarily by a member of the Standing Group.

Time and Frequency of Sessions

The Standing Group should be so organized as to function continuously.

Location

The permanent site of the Standing Group should be in Washington.

Permanent Representation

In order to maintain close contact with the Standing Group, a Party not represented thereon may appoint a special representative to provide permanent liaison with the Standing Group.

VI. REGIONAL PLANNING GROUPS

In order to ensure speedy and efficient planning of the unified defense of the whole North Atlantic area there should be established Regional Planning Groups on a geographical basis. It should be provided that:

(1) before any Regional Planning Group makes any recommendations affecting the defense of the territory or involving the use of forces, facilities, or resources of any Party not a member of that Group, that Party should have the right to participate in the Group in the work of formulating such recommendations;

(2) any Group which considers that a Party not a member of the Group can contribute to the defense planning of that Group's region, can call upon that Party to join in the planning as appropriate.

*Composition**Northern European Regional Planning Group*

Denmark, Norway, and the United Kingdom.

The United States has been requested and has agreed to participate actively in the defense planning as appropriate.

Other Parties may participate under the provisions listed above.

Western European Regional Planning Group

Belgium, France, Luxembourg, the Netherlands, and the United Kingdom.

Canada and the United States have been requested and have agreed to participate actively in the defense planning as appropriate.

Other Parties may, and in particular Denmark and Italy will, participate under the provisions listed above.

Southern European-Western Mediterranean Regional Planning Group

France, Italy, and the United Kingdom.

The United States has been requested and has agreed to participate actively in the defense planning as appropriate.

Other Parties may participate under the provisions listed above.

It is recognized that there are problems which are clearly common to the defense of the areas covered by the three European regional groups. It is therefore important that arrangements be made by the Defense Committee with a view to ensuring full coöperation between two, or if the need arises, all three groups.

Canadian-United States Regional Planning Group

Canada and the United States.

Other Parties may participate under the provisions listed above.

North Atlantic Ocean Regional Planning Group

Belgium, Canada, Denmark, France, Iceland, the Netherlands, Norway, Portugal, the United Kingdom and the United States.

The responsibilities for planning the defenses in the North Atlantic Ocean cannot be shared equally by all members of the Group. On the other hand, these responsibilities can to some extent be divided along functional lines and allocated to those Parties who are best able to perform the respective defense functions. Therefore, the North Atlantic Ocean Regional Planning Group, when it meets, should establish a series of planning sub-groups related to specific functions of defense. The Group should determine on which sub-group or sub-groups each Party should sit, and the arrangements necessary to ensure coördination between these sub-groups in the interest of speedy and effective planning.

Terms of Reference

Each Regional Planning Group should:

develop and recommend to the Military Committee through the Standing Group plans for the defense of the region;

coöperate with the other regional Planning Groups with a view to eliminating conflict in, and ensuring harmony among, the various regional plans.

Location

The Defense Committee should consider the question of the location of the Regional Planning Groups.

VII

The Council recognizes that the question of military production and supply is an integral part of the whole problem of the defense of the North Atlantic area. Consequently, there shall be established as soon as possible appropriate machinery to consider these matters. The details of organization of this machinery, terms of reference, etc., shall be studied forthwith by a working group which shall submit recommendations to the Defense Committee or to the Council.

VIII

The Council recognizes the importance of economic and financial factors in the development and implementation of military plans for the defense of the North Atlantic area. Consequently, there shall be established as soon as possible appropriate machinery to consider these matters. The details of organization of this machinery, terms of reference, etc., shall be studied forthwith by a working group which shall submit recommendations to the Council.

UNITED STATES

MUTUAL DEFENSE ASSISTANCE ACT OF 1949 ¹*Approved October 6, 1949*

AN ACT

TO PROMOTE THE FOREIGN POLICY AND PROVIDE FOR THE DEFENSE AND GENERAL
WELFARE OF THE UNITED STATES BY FURNISHING MILITARY
ASSISTANCE TO FOREIGN NATIONS

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the
"Mutual Defense Assistance Act of 1949."

FINDINGS AND DECLARATION OF POLICY

The Congress of the United States reaffirms the policy of the United States to achieve international peace and security through the United Nations so that armed force shall not be used except in the common interest. The Congress hereby finds that the efforts of the United States and other countries to promote peace and security in furtherance of the purposes of the Charter of the United Nations require additional measures of support based upon the principle of continuous and effective self-help and mutual aid. These measures include the furnishing of military assistance essential to enable the United States and other nations dedicated to the purposes and principles of the United Nations Charter to participate effectively in arrangements for individual and collective self-defense in support of those purposes and principles. In furnishing such military assistance, it remains the policy of the United States to continue to exert maximum efforts to obtain agreements to provide the United Nations with armed forces as contemplated in the Charter and agreements to achieve universal control of weapons of mass destruction and universal regulation and reduction of armaments, including armed forces, under adequate safeguards to protect complying nations against violation and evasion.

The Congress hereby expresses itself as favoring the creation by the free countries and the free peoples of the Far East of a joint organization, consistent with the Charter of the United Nations, to establish a program of self-help and mutual coöperation designed to develop their economic and social well-being, to safeguard basic rights and liberties and to protect their security and independence.

The Congress recognizes that economic recovery is essential to international peace and security and must be given clear priority. The Congress

¹ Public Law 329, 81st Cong., 1st Sess. (H.R. 5895); Department of State Bulletin, Vol. XXI, No. 538 (Oct. 24, 1949), p. 604.

also recognizes that the increased confidence of free peoples in their ability to resist direct or indirect aggression and to maintain internal security will advance such recovery and support political stability

TITLE I

NORTH ATLANTIC TREATY COUNTRIES

SEC. 101. In view of the coming into force of the North Atlantic Treaty and the establishment thereunder of the Council and the Defense Committee which will recommend measures for the common defense of the North Atlantic area, and in view of the fact that the task of the Council and the Defense Committee can be facilitated by immediate steps to increase the integrated defensive armed strength of the parties to the treaty, the President is hereby authorized to furnish military assistance in the form of equipment, materials, and services to such nations as are parties to the treaty and have heretofore requested such assistance. Any such assistance furnished under this title shall be subject to agreements, further referred to in section 402, designed to assure that the assistance will be used to promote an integrated defense of the North Atlantic area and to facilitate the development of defense plans by the Council and the Defense Committee under article 9 of the North Atlantic Treaty and to realize unified direction and effort; and after the agreement by the Government of the United States with defense plans as recommended by the Council and the Defense Committee, military assistance hereunder shall be furnished only in accordance therewith.

SEC. 102. There are hereby authorized to be appropriated to the President for the period through June 30, 1950, out of any moneys in the Treasury not otherwise appropriated, for carrying out the provisions and accomplishing the policies and purposes of this title, not to exceed \$500,000,000, of which not to exceed \$100,000,000 shall be immediately available upon appropriation, and not to exceed \$400,000,000 shall become available when the President of the United States approves recommendations for an integrated defense of the North Atlantic area which may be made by the Council and the Defense Committee to be established under the North Atlantic Treaty. The recommendations which the President may approve shall be limited, so far as expenditures, by the United States are concerned, entirely to the amount herein authorized to be appropriated and the amount authorized hereinafter as contract authority.

SEC. 103. In addition to the amount authorized to be appropriated under section 102, the President shall have authority, within the limits of specific contract authority which may be hereafter granted to him in an appropriation Act, to enter into contracts for carrying out the provisions and accomplishing the policies and purposes of this title in amounts not exceeding in the aggregate \$500,000,000 during the period ending June 30, 1950, and there are hereby authorized to be appropriated for expendi-

ture after June 30, 1950, such sums as may be necessary to pay obligations incurred under such contract authorization. No contract authority which may be granted pursuant to the provisions of this section shall be exercised by the President until such time as he has approved recommendations for an integrated defense of the North Atlantic area which may be made by the Council and the Defense Committee to be established under the North Atlantic Treaty.

SEC. 104. None of the funds made available for carrying out the provisions of this Act or the Act of May 22, 1947, as amended, shall be utilized (a) to construct or aid in the construction of any factory or other manufacturing establishment outside of the United States or to provide equipment or machinery (other than machine tools) for any such factory or other manufacturing establishment, (b) to defray the cost of maintaining any such factory or other manufacturing establishment, (c) directly or indirectly to compensate any nation or any governmental agency or person therein for any diminution in the export trade of such nation resulting from the carrying out of any program of increased military production or to make any payment, in the form of a bonus, subsidy, indemnity, guaranty, or otherwise, to any owner of any such factory or other manufacturing establishment as an inducement to such owner to undertake or increase production of arms, ammunition, implements of war, or other military supplies, or (d) for the compensation of any person for personal services rendered in or for any such factory or other manufacturing establishment, other than personal services of a technical nature rendered by officers and employees of the United States for the purpose of establishing or maintaining production by such factories or other manufacturing establishments to effectuate the purposes of this Act and in conformity with desired standards and specifications.

TITLE II

GREECE AND TURKEY

SEC. 201. In addition to the amounts heretofore authorized to be appropriated, there are hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, not to exceed \$211,370,000 to carry out the provisions of the Act of May 22, 1947, as amended, for the period through June 30, 1950.

TITLE III

OTHER ASSISTANCE

SEC. 301. The President, whenever the furnishing of such assistance will further the purposes and policies of this Act, is authorized to furnish military assistance as provided in this Act to Iran, the Republic of Korea, and the Republic of the Philippines.

SEC. 302. There are hereby authorized to be appropriated to the President for the period through June 30, 1950, out of any moneys in the Treasury not otherwise appropriated, for carrying out the provisions and accomplishing the purposes of section 301, not to exceed \$27,640,000.

SEC. 303. In consideration of the concern of the United States in the present situation in China, there is hereby authorized to be appropriated to the President, out of any moneys in the Treasury not otherwise appropriated, the sum of \$75,000,000 in addition to funds otherwise provided as an emergency fund for the President, which may be expended to accomplish in that general area the policies and purposes declared in this Act. Certification by the President of the amounts expended out of funds authorized hereunder, and that it is inadvisable to specify the nature of such expenditures, shall be deemed a sufficient voucher for the amounts expended.

TITLE IV

GENERAL PROVISIONS

SEC. 401. Military assistance may be furnished under this Act, without payment to the United States except as provided in the agreements concluded pursuant to section 402, by the provision of any service, or by the procurement from any source and the transfer to eligible nations of equipment, materials, and services: *Provided*, That no equipment or materials may be transferred out of military stocks if the Secretary of Defense, after consultation with the Joint Chiefs of Staff, determines that such transfer would be detrimental to the national security of the United States or is needed by the reserve components of the armed forces to meet their training requirements.

SEC. 402. The President shall, prior to the furnishing of assistance to any eligible nation, conclude agreements with such nation, or group of such nations, which agreements, in addition to such other provisions as the President deems necessary to effectuate the policies and purposes of this Act and to safeguard the interests of the United States, shall make appropriate provision for—

(a) The use of any assistance furnished under this Act in furtherance of the policies and purposes of this Act;

(b) restriction against transfer of title to or possession of any equipment and materials, information or services furnished under this Act without the consent of the President;

(c) the security of any article, service, or information furnished under this Act;

(d) furnishing equipment and materials, services, or other assistance, consistent with the Charter of the United Nations, to the United States or to and among other eligible nations to further the policies and purposes of this Act.

SEC. 403. (a) Any funds available for carrying out the policies and purposes of this Act, including any advances to the United States by any nation for the procurement of equipment and materials or services, may be allocated by the President for any of the purposes of this Act to any agency, and such funds shall be available for obligation and expenditure for the purpose of this Act in accordance with authority granted hereunder or under the authority governing the activities of the agency to which such funds are allocated.

(b) Reimbursement shall be made by or to any agency from funds available for the purpose of this Act for any equipment and materials, services or other assistance furnished or authorized to be furnished under authority of this Act from, by, or through any agency. Such reimbursement shall include expenses arising from or incident to operations under this Act and shall be made by or to such agency in an amount equal to the value of such equipment and materials, services (other than salaries of members of the armed forces of the United States) or other assistance and such expenses. The amount of any such reimbursement shall be credited as reimbursable receipts to current applicable appropriations, funds, or accounts of such agency and shall be available for, and under the authority applicable to, the purposes for which such appropriations, funds, or accounts are authorized to be used, including the procurement of equipment and materials or services, required by such agency, in the same general category as those furnished by it or authorized to be procured by it and expenses arising from and incident to such procurement.

(c) The term "value," as used in subsection (b) of this section, means—

(1) with respect to any excess equipment or materials furnished under this Act, the gross cost of repairing, rehabilitating, or modifying such equipment or materials prior to being so furnished;

(2) with respect to any non-excess equipment or materials furnished under this Act which are taken from the mobilization reserve (other than equipment or materials referred to in paragraph (3) of this subsection), the actual or the projected (computed as accurately as practicable) cost of procuring for the mobilization reserve an equal quantity of such equipment or materials or an equivalent quantity of equipment and materials of the same general type but deemed to be more desirable for inclusion in the mobilization reserve than the equipment or materials furnished;

(3) with respect to any non-excess equipment or materials furnished under this Act which are taken from the mobilization reserve but with respect to which the Secretary of Defense has certified that it is not necessary fully to replace such equipment or materials in the mobilization reserve, the gross cost to the United States of such equipment and materials or its replacement cost, whichever the Secretary of Defense may specify; and

(4) with respect to any equipment or materials furnished under this Act which are procured for the purpose of being so furnished, the gross cost to the United States of such equipment and materials.

In determining the gross cost incurred by any agency in repairing, rehabilitating, or modifying any excess equipment furnished under this Act, all parts, accessories, or other materials used in the course of such repair, rehabilitation, or modification shall be priced in accordance with the current standard pricing policies of such agency. For the purpose of this subsection, the gross cost of any equipment or materials taken from the mobilization reserve means either the actual gross cost to the United States of that particular equipment or materials or the estimated gross cost to the United States of that particular equipment or materials obtained by multiplying the number of units of such particular equipment or materials by the average gross cost of each unit of that equipment and materials owned by the furnishing agency.

(d) Not to exceed \$450,000,000 worth of excess equipment and materials may be furnished under this Act or may hereafter be furnished under the Act of May 22, 1947, as amended. For the purposes of this subsection, the worth of any excess equipment or materials means either the actual gross cost to the United States of that particular equipment or materials or the estimated gross cost to the United States of that particular equipment or materials obtained by multiplying the number of units of such particular equipment or materials by the average gross cost of each unit of that equipment or materials owned by the furnishing agency.

Sec. 404. The President may exercise any power or authority conferred on him by this Act through such agency or officer of the United States as he shall direct, except such powers or authority conferred on him in section 405 and in clause (2) of subsection (b) of section 407.

Sec. 405. The President shall terminate all or part of any assistance authorized by this Act under any of the following circumstances:

(a) If requested by any nation to which assistance is being rendered;
(b) If the President determines that the furnishing of assistance to any nation is no longer consistent with the national interest or security of the United States or the policies and purposes of this Act; or

(c) If the President determines that provision of assistance would contravene any decision of the Security Council of the United Nations, or if the President otherwise determines that provision of assistance to any nation would be inconsistent with the obligation of the United States under the Charter of the United Nations to refrain from giving assistance to any nation against which the United Nations is taking preventive or enforcement action or in respect of which the General Assembly finds the continuance of such assistance is undesirable.

(d) Assistance to any nation under this Act may, unless sooner termi-

nated by the President, be terminated by concurrent resolution by the two Houses of the Congress: *Provided*, That funds made available under this Act shall remain available for twelve months from the date of such termination for the necessary expenses of liquidating contracts, obligations, and operations under this Act.

SEC. 406. (a) Any agency may employ such additional civilian personnel without regard to section 14 (a) of the Federal Employees Pay Act of 1946 (60 Stat. 219), as amended, as the President deems necessary to carry out the policies and purposes of this Act.

(b) Notwithstanding the provisions of Revised Statutes 1222 (U. S. C., title 10, sec. 576), personnel of the armed forces may be assigned or detailed to noncombatant duty, including duty with any agency or nation, for the purpose of enabling the President to furnish assistance under this Act.

(c) Technical experts and engineering consultants, not to exceed fifteen persons at any one time, as authorized by section 15 of the Act of August 2, 1946 (U. S. C., title 5, sec. 55a), required for the purposes of this Act, may, if the President deems it advantageous for the purposes of this Act and if in his opinion the existing facilities of the agency concerned are inadequate, be employed by any agency performing functions under this Act, and individuals so employed may be compensated at rates not in excess of \$50 per diem.

(d) Service of any individual employed as a technical expert or engineering consultant under subsection (c) of this section shall not be considered as service or employment bringing such individual within the provisions of sections 281, 283, and 284 of United States Code, title 18, of section 190 of the Revised Statutes (U. S. C., title 5, sec. 99), or of any other Federal law imposing restrictions, requirements, or penalties in relation to the employment of persons, the performance of services, or the payment or receipt of compensation in connection with any claim, proceeding, or matter involving the United States, except insofar as such provisions of law may prohibit any such individual from receiving compensation in respect of any particular matter in which such individual was directly involved in the performance of such service.

(e) For the purpose of carrying out the provisions of this Act, there may be employed not to exceed three persons at a rate of compensation not to exceed \$15,000 and one person at a rate of compensation not to exceed \$16,000. Any person so employed shall be appointed by the President, by and with the advice and consent of the Senate.

SEC. 407. (a) Nothing in this Act shall alter, amend, revoke, repeal, or otherwise affect the provisions of the Atomic Energy Act of 1946 (60 Stat. 755).

(b) The President may perform any of the functions authorized under section 401 of this Act without regard to (1) the provisions of title 10,

United States Code, section 1262 (a), and title 34, United States Code, section 546 (e); and (2) such provisions as he may specify of the joint resolution of November 4, 1939 (54 Stat. 4), as amended.

SEC. 408. (a) Notwithstanding any other provision of law, the Reconstruction Finance Corporation is authorized and directed, until such time as appropriations shall be made under the authority of this Act and the Act of May 22, 1947, as amended, to make advances not to exceed in the aggregate \$125,000,000 to carry out the provisions of this Act and the Act of May 22, 1947, as amended, in such manner, at such time, and in such amounts as the President shall determine, and no interest shall be charged on advances made by the Treasury to the Reconstruction Finance Corporation for this purpose. The Reconstruction Finance Corporation shall be repaid without interest for advances made by it hereunder from funds made available for the purposes of this Act and the Act of May 22, 1947, as amended.

(b) Funds made available for carrying out the provisions of title I shall be available for the expenses of administering the provisions of this Act and of the Act of May 22, 1947, as amended. Whenever possible the expenses of administration of this Act shall be paid for in the currency of the nation where the expense is incurred, as provided in subsection (d).

(c) Whenever he determines that such action is essential for the effective carrying out of the purposes of this Act, the President may from time to time utilize not to exceed in the aggregate 5 per centum of the amounts made available for the purposes of any title of this Act for the purposes of any other title. Whenever the President makes any such determination, he shall forthwith notify the Committee on Foreign Relations of the Senate, the Committees on Armed Services of the Senate and of the House of Representatives, and the Committee on Foreign Affairs of the House of Representatives.

(d) Upon approval by the President, any currency of any nation received by the United States for its own use in connection with the furnishing of assistance under this Act may be used for expenditures for essential administrative expenses of the United States in any such nation incident to operations under this Act and the amount, if any, remaining after the payment of such administrative expenses shall be used only for purposes specified by Act of Congress.

(e) The President may, from time to time, in the interest of achieving standardization of military equipment and in order to provide procurement assistance without cost to the United States, transfer, or enter into contracts for the procurement for transfer of, equipment, materials or services to nations designated in title I, II, or III of this Act, or to a nation which has joined with the United States in a collective defense and regional arrangement: *Provided*, That, prior to any such transfer or the execution of any such contracts, any such nation shall have made available

to the United States the full cost, actual or estimated, of such equipment, materials, or services, and shall have agreed to make available forthwith upon request any additional sums that may become due under such contracts.

(f) Any equipment or materials procured to carry out the purposes of title I of this Act shall be retained by, or transferred to, and for the use of, such department or agency of the United States as the President may determine in lieu of being disposed of to a nation which is a party to the North Atlantic Treaty whenever in the judgment of the President of the United States such disposal to a foreign nation will not promote the self-help, mutual aid, and collective capacity to resist armed attack contemplated by the treaty or whenever such retention is called for by concurrent resolution by the two Houses of the Congress.

SEC. 409. That at least 50 per centum of the gross tonnage of any equipment, materials, or commodities made available under the provisions of this Act, and transported on ocean vessels (computed separately for dry bulk carriers and dry cargo liners) shall be transported on United States flag commercial vessels at market rates for United States flag commercial vessels in such manner as will insure a fair and reasonable participation of United States flag commercial vessels in cargoes by geographic areas.

SEC. 410. The President, from time to time, but not less frequently than once every six months, while operations continue under this Act, shall transmit to the Congress reports of expenditures and activities authorized under this Act, except information the disclosure of which he deems incompatible with the security of the United States. Reports provided for under this section shall be transmitted to the Secretary of the Senate or the Clerk of the House of Representatives, as the case may be, if the Senate or the House of Representatives, as the case may be, is not in session.

SEC. 411. For the purpose of this Act—

(a) The terms "equipment" and "materials" shall mean any arms, ammunition or implements of war, or any other type of material, article, raw material, facility, tool, machine, supply, or item that would further the purposes of this Act, or any component or part thereof, used or required for use in connection therewith, or required in or for the manufacture, production, processing, storage, transportation, repair, or rehabilitation of any equipment or materials, but shall not include merchant vessels.

(b) The term "mobilization reserve," as used with respect to any equipment or materials, means the quantity of such equipment or materials determined by the Secretary of Defense under regulations prescribed by the President to be required to support mobilization of the armed forces of the United States in the event of war or national emergency until such time as adequate additional quantities of such equipment or materials can be procured.

(c) The term "excess," as used with respect to any equipment or materials, means the quantity of such equipment or materials owned by the United States which is in excess of the mobilization reserve of such equipment or materials.

(d) The term "services" shall include any service, repair, training of personnel, or technical or other assistance or information necessary to effectuate the purposes of this Act.

(e) The term "agency" shall mean any department, agency, establishment, or wholly owned corporation of the Government of the United States.

(f) The term "armed forces of the United States" shall include any component of the Army of the United States, of the United States Navy, of the United States Marine Corps, of the Air Force of the United States, of the United States Coast Guard, and the reserve components thereof.

(g) The term "nation" shall mean a foreign government eligible to receive assistance under this Act.

SEC. 412. Whoever offers or gives to anyone who is now or in the past two years has been an employee or officer of the United States any commission, payment, or gift, in connection with the procurement of equipment, materials, or services under this Act, and whoever, being or having been an employee or officer of the United States in the past two years, solicits, accepts, or offers to accept any such commission, payment, or gift, shall upon conviction thereof be subject to a fine of not to exceed \$10,000 or imprisonment for not to exceed three years, or both.

SEC. 413. If any provision of this Act or the application of any provision to any circumstances or persons shall be held invalid, the validity of the remainder of the Act and applicability of such provision to other circumstances or persons shall not be affected thereby.

Approved October 6, 1949.

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AMERICAN CONSULAR RIGHTS IN COMMUNIST CHINA

BY HERBERT W. BRIGGS

Professor of International Law, Cornell University

THE ANGUS WARD CASE

On November 20, 1948, Chinese Communist Party soldiers, without previous warning, cordoned the United States Consul General's office and the residential compounds of the consular staff at Mukden, China, and subjected the entire United States consular staff and their families to house arrest inside the compounds. The detention lasted over a year. For almost seven months the party was held incommunicado and subjected to numerous privations. Adequate water, light, medical care, and sanitary and roofing repairs were denied, mobility within the compounds was restricted, and members of the staff were subjected to badgering interrogations and examinations.¹

The official pretext for the detention was stated by a delegation of the Chinese Communist Military Control Committee of Mukden to (Consul General) Angus Ward as follows: "Your failure to surrender radio station constitutes an intentional defiance; the personnel of the former American consulate general are hereafter forbidden intercourse with the outside."² Consul General Ward protested against the denial of his official status, asserting that it had previously been recognized by Chinese Communist civil and military authorities, and claimed the right to communicate with the United States Government. However, all attempted communications with Washington or with American foreign service officers in Nationalist China were stopped with the excuse that "United States and Northeast Peoples Government are not in a diplomatic relationship." From November 20, 1948, until June 6, 1949, "no communication of any type with the outside world was permitted, and in more than a year, no communication whatever was permitted with other Mukden residents. Passers-by were even arrested for waving greetings."³

¹ "Angus Ward Summarizes Mukden Experiences," Department of State Bulletin, Vol. XXI, No. 547 (Dec. 26, 1949), p. 955.

² *Id.* An announcement of the Department of State on May 31, 1949, said, in part: "On November 18, 1948—18 days after the occupation of Mukden—the Chinese Communist authorities forced the closure of the Consulate General's radio facilities, and despite innumerable subsequent attempts to restore communications, no direct word has been received from Consul General Ward or his staff." *Id.*, No. 523 (July 11, 1949), p. 36, note.

³ *Id.*, No. 547, p. 955, quoting Angus Ward's statement.

On May 17, 1949, the Department of State, because "it was impossible for the consulate to perform any of its functions," instructed the U. S. Consul General at Peiping to inform the "appropriate authorities" that the United States had decided to close the consulate general at Mukden.⁴ Consul General O. Edmund Clubb of Peiping so informed the General Headquarters of the (Communist) People's Liberation Army on May 19, and the Mukden authorities notified Angus Ward on June 21, 1949, that he and his staff would be permitted to depart with movable property and that transportation facilities would be made available.⁵

Instead of honoring these assurances, the Chinese Communist authorities subjected the American consular officials to further indignities and to months of vexatious delays.⁶ On October 11, 1949, occurred an incident which was apparently seized upon by the Chinese Communists to cause a serious "loss of face" by representatives of the United States Government. A discharged Chinese employee of the Consulate General surreptitiously re-entered the consular premises and made demands for money. An attempt by Consul General Ward to eject him led to a scuffle, culminating in the arrest and imprisonment on October 24 of Ward and four members of his staff, apparently for assault.⁷

In the meantime, the Chinese Communists had conquered most of northern and central China and, on October 1, 1949, proclaimed the establishment of the (Communist) Central People's Government of the People's Republic of China.⁸ Efforts of the United States Government to secure the release of its consular representatives or to get in touch with them were unavailing. The authorities in Mukden refused to permit the consular staff to make a report concerning the facts or to make arrangements for the defense of the imprisoned officials.⁹ On November 3, 1949, Consul General Clubb in Peiping sent a letter to Chou En-lai (the Foreign Minister of the Chinese Communist régime), requesting that the United States Government be supplied with authoritative information as to the arrest, expressing the "grave concern" of the United States Government over the "arbitrary" detention of the Mukden consular staff "in clear violation of established principles of international comity and practice respecting treatment of foreign consular officials," and requesting that the British Consular Representative in Mukden be permitted to see Mr. Ward and "that the matter be handled in accord with established principles of international law and practice."¹⁰ The letter was ignored.¹¹

On November 18, 1949, Secretary of State Dean Acheson sent a "per-

⁴ *Id.*, No. 543 (Nov. 28, 1949), p. 799.

⁵ *Id.*, No. 542 (Nov. 21, 1949), p. 759. ⁶ *Id.*, No. 547, p. 956.

⁷ See Ward's account of the incident in *id.*, pp. 956-957.

⁸ See New York Times, Oct. 3, 1949, pp. 1-2.

⁹ Department of State Bulletin, Vol. XXI, No. 543, p. 800.

¹⁰ *Id.*, No. 542, pp. 759-760.

¹¹ *Id.*, p. 759, and No. 543, p. 800.

sonal message" to the Foreign Ministers of the thirty states which maintained either diplomatic or consular representatives "in China," emphasizing "the importance of concerted action by those countries which respect international law to protest the treatment being accorded United States consular personnel in Mukden, China," and concluding as follows:

The international practice of civilized countries for many years has recognized that consuls should be accorded all the privileges necessary for the proper conduct of their duties. Although consuls do not have diplomatic immunity, it has been the universal practice, because of the public and official character of their duties, to permit them and their staff freedom of movement, and in the event that any criminal charge is made, to permit them to remain at liberty on proper arrangements for bail, with unlimited freedom to communicate with their Governments with respect to official business.

The treatment accorded to Mr. Ward and to the American consular staff in Mukden is in direct violation of the basic concepts of international relations which have been developed throughout the centuries. As such, it is of direct and immediate concern to all countries interested in diplomatic intercourse, particularly to those with missions or consulates in China. I ask you, as a matter of urgency, to express to the highest Chinese authorities in Peiping through such channels as may be available to you the concern which your Government undoubtedly feels over the treatment of the American consular staff in Mukden who have been arbitrarily deprived of their freedom for one year.¹²

On November 23 Consul General Ward was able to telephone Mr. Clubb in Peiping that he and his four colleagues had been released on November 22 after a "so-called trial," that all had been found guilty and sentenced to further imprisonment, but that their sentences had been commuted to deportation.¹³ Before they were permitted to leave Mukden, however, another member of the consular staff, Vice Consul William H. Stokes, was "removed" from the consulate by the Communist authorities for seven hours to attend a hearing in connection with charges against an alleged "American spy ring." Ward reported to Clubb that he had been unable to determine whether Stokes' presence had been required as a witness or as a defendant, but that a Chinese Communist People's Court, in sentencing certain named "spies," had also sentenced all non-Chinese members of the U. S. Consulate General Staff to deportation, without having named

¹² For the complete text see *id.*, No. 543, pp. 799-800.

¹³ *Id.*, p. 799, and No. 547, p. 957. Mr. Ward subsequently stated that he did not know why he had been arrested until an indictment, poorly translated into English, was read once in court after he had been held in jail for 28 days, 24 of which were in solitary confinement on bread and water. N. Y. Times, Dec. 12, 1949. In addition to assault, Mr. Ward was apparently "charged with certain financial obligations," including compensation, severance pay and extra salary payments.

any of them at the "trial."¹⁴ On December 7, 1949, the staff of the Consulate General, with dependents, was permitted to leave Mukden under heavy guard and constant surveillance,¹⁵ and on December 12 the party was delivered on board an American vessel at Tientsin.¹⁶

OTHER INCIDENTS

Arrest of Vice Consul Olive. On July 6, 1949, U. S. Vice Consul William M. Olive was arrested by Shanghai police and armed Communist soldiers for driving on a street which, unknown to him, had been declared reserved for a parade. Despite his identification of himself as an American consular official, he was brutally beaten, handcuffed for almost 24 hours, denied medical examination for his injuries, kept on a diet of bread and water for three days, forced to sign several dictated "confessions," to submit to a "trial" at which he was charged with eight offenses, and forced to listen to harangues about the manner in which foreigners should conduct themselves under a "people's régime." He was denied permission to telephone the Consulate General, nor were consular officials of the United States permitted to see him or provide food. Indeed, consular officials who attempted to see him were themselves detained temporarily at the police station for alleged violation of regulations. He was released on July 9 after being forced to perform the "kow-tow" while being photographed.¹⁷

Siege of the United States Consulate General at Shanghai. On July 29, 1949, at 7:30 a.m., a group of 30 or 40 alien former employees of the United States Navy forced their way into the U. S. Consulate General at Shanghai and announced their intention of remaining in occupancy of the premises until satisfactory settlement of their demands regarding separation pay and severance bonuses had been granted. Despite repeated requests of the consular authorities for police protection against violence, and protests that the invasion of the premises "constituted a violation of the most elementary principles of international law and universal practice, since the premises in question were the property of the United States Government and used for official purposes," the local Communist authorities refused to intervene in what they termed "a labor dispute" and refused to afford the protection requested. After being permitted by these authorities to occupy the consular premises for 4½ days, the workers with-

¹⁴ Department of State Bulletin, No. 545 (Dec. 12, 1949), p. 907. On June 22, 1949, the Department of State denied categorically that any "member of the staff of the Consulate General is or has been involved in espionage activities" and stated that Communist allegations to the contrary appeared explicable "only as an effort to excuse the unjustifiable treatment accorded personnel of the Consulate General by the Chinese Communist authorities, contrary to generally accepted standards of international law and comity." *Id.*, No. 523, p. 36, and No. 545, p. 907.

¹⁵ *Id.*, No. 547, p. 957.

¹⁶ N. Y. Times, Dec. 12, 1949.

¹⁷ "Account of Vice Consul Olive's Detention by Shanghai Communists," Department of State Bulletin, Vol. XXII, No. 548 (Jan. 2, 1950), p. 23.

drew, apparently persuaded that their demands would not be granted under coercion and intimidation. On August 22, 1949, Acting American Consul General Walter P. McConaughy in Shanghai protested to the Chinese Communist authorities in Shanghai that

the failure of the local authorities for over 4 days, to take effective action to terminate the illegal occupation of the premises at 2 Peking Road constitutes a serious repudiation of the minimum standards of international law and comity by condoning the invasion of the property of a sovereign state situated within territory purportedly controlled by those authorities

and that the authorities had failed to fulfill "obligations towards protection of life and property which are universally recognized under international law and practice."¹⁸

Smith-Bender Case. On October 19, 1948, two American servicemen, Chief Electrician William C. Smith, USN, and Master Sergeant Elmer C. Bender, USMC, "failed to return from a routine training flight over territory in the Tsingtao area of Shantung Province, China. The two men were members of the United States Naval Headquarters which was established at Tsingtao at the request of the Government of the Republic of China." Receiving reports that the flyers were being held incommunicado by Chinese Communist authorities, the Department of State and the Department of the Navy attempted in vain to secure their release.¹⁹ On November 30, 1949, Secretary of State Acheson issued a statement to the press reading in part as follows:

In contravention of all accepted principles and practices of international behavior the United States Government has not been informed in any way, despite repeated inquiries, of the reasons for or the circumstances surrounding their detention.

The staff of the American consulate general at Tsingtao has not been permitted to get in touch with the men to ascertain their exact whereabouts and welfare. Heretofore, the efforts of the consulate general at Peiping to ascertain the facts in this case and to obtain the release of Mr. Smith and Mr. Bender have also been ignored. A further letter has now been addressed to the authorities of the recently established Communist regime at Peiping.

The Chinese Communist authorities are apparently unaware that the international practice of civilized countries for many years has recognized that consuls should be afforded full opportunity for the proper conduct of their duties in the protection of their nationals.

These men have been held for over a year completely incommunicado from their consular representatives and from members of their families. I should like to emphasize that American public and official

¹⁸ *Id.*, Vol. XXI, No. 533 (Sept. 19, 1949), pp. 440-441. The letter of protest does not textually refer to "Consulate General," "consular" premises, "consular" representatives, or "Communist" authorities.

¹⁹ *Id.*, p. 442.

opinion which has been deeply concerned about these violations of accepted international procedures is now thoroughly indignant over the inhumane treatment which continues to be accorded these two American citizens and the hardship and suffering being experienced by their families.²⁰

During the week following this statement an official of the Chinese Communist Foreign Affairs Bureau informed United States consular officials at Tsingtao that Smith and Bender were safe and well and that they were being held at a Communist military base just outside Tsingtao. The Department of State, in communicating this information to relatives of the two men, stated that it was continuing its efforts to effect their release.²¹

Refusal of Exit Visas. Among the cases in which Chinese Communist authorities refused exit visas to American diplomatic or consular officials because of alleged possible debts or severance pay owed to Chinese were the cases of the American military attaché at Nanking and consular officials at Shanghai. On October 26, 1949, Secretary Acheson issued a press statement which said in part:

The Department takes a serious view of the flimsy pretext used by the local authorities to prevent departure of an American official from China in contravention of generally recognized principles of international law. The United States Government does not countenance negotiations under duress and will not authorize its representatives in China to submit to such pressure.²²

SEIZURE OF CONSULAR PROPERTIES IN PEIPING

On January 6, 1950, the (Communist) Peking Municipal Military Control Commission of the Chinese People's Liberation Army proclaimed, *inter alia*, that because "certain foreign countries in the past, utilizing so-called 'right of stationing troops' of unequal treaties, have occupied land in Peking municipality and constructed military barracks," and "because unequal treaties have now been abolished this type of real property right naturally should be recovered," therefore, "at present, because of military exigencies, this type of military barracks and other installations will first be requisitioned." On January 7 the American Consul General at Peiping was notified that "after arrival this order it is expected special messenger will promptly be dispatched with authority turn over on schedule. Delay not to be permitted, this order."²³

By instruction of the Department of State, Consul General O. Edmund Clubb, calling attention to a circumstance which "may have been overlooked," namely, that "the actual office of the American Consulate Gen-

²⁰ *Id.*, No. 545 (Dec. 12, 1949), p. 908.

²¹ *Id.*, Vol. XXII, No. 549 (Jan. 9, 1950), p. 56. See also *id.*, No. 555 (Feb. 20, 1950), p. 296.

²² *Id.*, Vol. XXI, No. 540 (Nov. 7, 1949), pp. 709-710.

²³ *Id.*, Vol. XXII, No. 551 (Jan. 23, 1950), pp. 119, 121.

eral is located in the former barracks," and assuming "that the local authorities have acted without consultation with or instructions from higher authorities," on January 9 and 10 sent communications to General Chou En-lai (the Communist Minister for Foreign Affairs).²⁴ The communication of January 10, by instruction of the Department of State, said in part:

In accordance with Article VII of the Protocol signed at Peking on September 7, 1901,²⁵ by representatives of Austria-Hungary, Belgium, France, Germany, Great Britain, Italy, Japan, The Netherlands, Russia, Spain, the United States, and China, the United States Government acquired the right to use for official purposes the land which was allocated to the United States Government pursuant to that Protocol and on parts of which are located buildings belonging to the United States Government and used for official purposes. This right was reaffirmed in Article II of the Treaty between the United States and China signed at Washington on January 11, 1943,²⁶ under which the United States relinquished its extraterritorial rights in China. This land and the buildings thereon are now being used for official purposes by the American Consulate General at Peking. The so-called military barracks mentioned in the order under reference has long since been converted into an office building and used as the office of the American Consulate General.

²⁴ *Id.*, pp. 120-122.

²⁵ Article VII read in part as follows: "The Chinese Government has agreed that the quarter occupied by the legations shall be considered as one specially reserved for their use and placed under their exclusive control, in which Chinese shall not have the right to reside and which may be made defensible." Malloy, *Treaties, etc.*, Vol. II, pp. 2006, 2010. Cf. J. V. A. MacMurray, *Treaties and Agreements With and Concerning China* (1921), Vol. I, pp. 278, 282, 298, 315-316.

²⁶ Article II of this treaty reads as follows (U.S.T.S., No. 984):

"The Government of the United States of America considers that the Final Protocol concluded at Peking on September 7, 1901, between the Chinese Government and other governments, including the Government of the United States of America, should be terminated and agrees that the rights accorded to the Government of the United States of America under that protocol and under agreements supplementary thereto shall cease.

"The Government of the United States of America will coöperate with the Government of the Republic of China for the reaching of any necessary agreements with other governments concerned for the transfer to the Government of the Republic of China of the administration and control of the Diplomatic Quarter at Peiping, including the official assets and the official obligations of the Diplomatic Quarter, it being mutually understood that the Government of the Republic of China in taking over administration and control of the Diplomatic Quarter will make provision for the assumption and discharge of the official obligations and liabilities of the Diplomatic Quarter and for the recognition and protection of all legitimate rights therein.

"The Government of the Republic of China hereby accords to the Government of the United States of America a continued right to use for official purposes the land which has been allocated to the Government of the United States of America in the Diplomatic Quarter in Peiping, on parts of which are located buildings belonging to the Government of the United States of America." See this JOURNAL, Supp., Vol. 37 (1943), p. 65.

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²⁸ *Id.*, p. 120.

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³¹ *Id.*, pp. 119, 121, 122-1
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³² Department of State I

³³ *Id.*, and N. Y. Times, .

- 1) By preventing, or interfering with, the exercise of consular functions (Ward, Olive, Shanghai siege, Smith-Bender, and, potentially, consulate seizure cases);
- 2) By refusal to protect and respect consular personnel (Ward, Shanghai siege, and exit visa cases);
- 3) By refusal to protect and respect consular premises (Ward, Peiping cases);
- 4) By denial of freedom of communication between authorizing state (Ward, Stokes and Olive cases), and between consular officials and their detained nationals (Ward, Stokes, Smith-Bender cases); by refusal to accept communications from officials of the sending state (Peiping case) and by refusal to inform the sending state as to detained nationals to officials of the sending state (Ward, Olive, and Smith-Bender cases);
- 5) By denial of justice in the arrest, detention or trial of consular personnel (Ward, Stokes, and Olive cases);
- 6) By subjecting consular personnel to indignities or flagrant mistreatment (Ward, Stokes, Olive, Shanghai, exit visa, and Peiping cases).

It is interesting to note the phrases employed by the Department to characterize these acts or omissions. The conduct of the Chinese authorities in the Ward case was branded as "in direct violation of the basic concepts of international *relations*," as in violation of "international *practice of civilized countries*" and of "*universal principles of international practice*." In the Smith-Bender case the charges were that the Communist authorities had infringed "the international practice of civilized countries" and violated "*accepted international procedures and principles and practices of international behavior*." The violation of the Peiping consular properties was called by the Department a "flagrant violation" "of the most elementary standards of international *conduct*."

It is true that in the Ward case an appeal was made for consideration of the countries which respect "international law"; the Chinese authorities were called upon to handle the matter "in accordance with the principles of international law and practice"; and the charges against American consular officials were characterized as an excuse for their unjustifiable treatment "contrary to generally accepted standards of international law and comity." Similarly, the failure of the Chinese authorities to protect the Shanghai consulate from siege and seizure was termed "a serious repudiation of the minimum standards of international law and comity" and a failure to fulfill "obligations generally recognized under international law and practice." The refusal to issue exit visas was characterized as "in contravention of generally accepted principles of international law." The seizure of the consular

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³⁵ See, generally, Harvard
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³⁶ Feller and Hudson, *op. c*

Soviet regulations approved January 14, 1927, provide in Article 1: "Consular representatives of foreign states enjoy on the basis of modern international law the rights and privileges attached to their functions in conformity with the principles of international law." After specifying certain rights and privileges flowing from international law, the Soviet regulations stipulate that the rights are to be determined by treaty.⁸⁷ The Harvard Research in International Law observes that "national regulations, in referring to national law, custom, practice, established usage or international law, authority for the exercise of consular functions, doubtless intend to indicate practices or customs accepted by all or nearly all nations, although some regulations clearly recognize "local custom" as a national source of right to exercise certain consular functions."⁸⁸

If, ordinarily, a privilege or immunity based upon usage might be regarded as a privilege voluntarily or reciprocally granted rather than a legal right, nevertheless the Treaty between the United States and the Republic of China on the Relinquishment of Extraterritorial Rights in China and the Protocol Relating to Related Matters, signed at Washington, January 11, 1911, shows in Article VI a reciprocal legal obligation to accord to consular officers the rights, privileges, and immunities enjoyed by consular officers under modern international usage."⁸⁹ The full text of Article VI follows:

The Government of the United States of America and the Government of the Republic of China mutually agree that the consuls of each country, duly provided with exequaturs, shall be permitted to reside in such ports, places and cities as may be agreed upon; consular officers of each country shall have the right to interview and communicate with, and to advise nationals of their country within consular districts; they shall be informed immediately when nationals of their country are under detention or arrest or in custody, and are awaiting trial in their consular districts and they shall, upon notification to the appropriate authorities, be permitted to visit such nationals; and, in general, the consular officers of each country shall be accorded the rights, privileges, and immunities enjoyed by consular officers under modern international usage.

It is likewise agreed that the nationals of each country, in custody in the territory of the other country, shall have the right at all times to communicate with the consular officers of their country. Communications between their consular officers and nationals of each country who are under detention or arrest or in prison or are awaiting trial in the territory of the other country shall be forwarded to such consular officers through the local authorities.

⁸⁷ *Id.*, pp. 1220-1221.

⁸⁸ Harvard Research, *loc. cit.*, p. 252.

⁸⁹ U. S. Treaty Series, No. 984. Art. VII of the treaty provides, in part, that at the conclusion of a treaty on consular rights, questions concerning American nationals, not governed by existing treaties, "shall be discussed by representatives of the two Governments and shall be decided in accordance with generally accepted principles of international law and with modern international practice."

Thus, aside from specific provisions, consular officers in China were to be informed of their detention rights, privileges and immunities under international usage."

Modern international law is set forth in detail in the Harvard Research in International Law, *Functions of Consuls*. B. The receiving state shall accord to a consular officer a position adequate for the exercise of his functions. This adds, with citation of authority, that consular officers have generally been recognized as having the right to exercise of consular functions. In the *Harvard Case*, Commissioner Fred C. Case, undoubtedly secures to a consular officer a position without improper interference with the exercise of his functions to consular officers has led to the present situation.

Although it is debatable whether international law stipulates for consular immunity, the *Harvard Case* observes that "a consular officer is entitled to exemption from arrest for acts done in the exercise of his functions in treaties and diplomatic practice. This exemption for foreigners is a universally recognized principle."

Although the "inviolability" of consular archives, is not an absolute immunity from invasion of a consular office, the *Harvard Case* it against invasion by other states and are supported by modern international law.

Article 11 of the Harvard

A receiving state shall

(d) To communicate with the consular district; to visit, imprisoned or detained such nationals in prison; and to inquire into the conditions of the consular district and

⁴⁰ *Loc. cit.*, pp. 313, 315.

⁴¹ United States-Mexico, General Convention, p. 264. See also Hyde, *op. cit.*

⁴² Harvard Research, *loc. cit.* Hyde, *op. cit.*, Vol. II, pp. 1327.

⁴³ *Loc. cit.*, p. 336. See also thirty states by Secretary of State.

⁴⁴ Harvard Research, *loc. cit.* Worth, Digest, Vol. IV, pp. 716.

A receiving state shall permit a consular representative of the sending state, with the other consuls of the sending state in state . . . and with the consuls of other states by any available means. . . .⁵⁰

In 1930, the Department of State approved a protest by the consular branch of a local military commissioner against the communication with their respective legations in part:

Under international law a consular representative of a government in communication with his own government . . . consular representatives of his government in foreign territory. . . .⁵¹

It would thus appear that the conduct of the authorities against which the United States protested was a violation of "modern international usage." It is not clear whether the Chinese Communist authorities intended to violate the Treaty of 1943 between China and the United States on the principles of international law. With reference to events occurring or continuing after the establishment of the Government of China (*i.e.*, the Ward, Pei, and Smith-Bender cases), a decision was given to both questions. The classic statement of Moore that

changes in the government or the international law affect its position in international law, the nation remains, with its rights and obligations paired. . . . The state is bound by engagements that have ceased to exist.⁵²

is supported with a wealth of cited authorities. In the Draft on the Law of Treaties, which contains no provision otherwise provided in the treaty itself, the provisions of the treaty are not affected by any change in its constitutional system."⁵³ Nor are the provisions of the treaty with regard to the continuity of states dependent on the new government. At most, the absence of the new government may, if the execution of the treaty is the maintenance of diplomatic relations between the states, result in the suspension of the operation of the treaty.

⁵⁰ *Id.*, p. 306.

⁵¹ *Id.*

⁵² Moore, *Digest*, Vol. I, p. 249.

⁵³ This JOURNAL, Supp., Vol. 29 (1935), pp. 1044.

⁵⁴ *Id.*, pp. 1055, 1057.

AMERICAN CONSULAR RIGHTS IN COMMUNIST CHINA

Research comments in its Draft on the Legal Position and Function Consuls, "mere change of government by either the sending or the receiving state, even though the change is of revolutionary character, does modify the status of consuls." ⁵⁵

The right of a state, or of a *de facto* régime, to revoke the *exequatur* to terminate the consular status of consuls previously admitted to territory under its control ⁵⁶ does not justify preventing their departure or subjecting them to mistreatment. Even if it be assumed, *arguendo*, that Chinese Communist authorities did take steps to terminate the consular status of American consuls previously admitted to China, ⁵⁷ the consuls as "nationals of the United States," were entitled by Article I of the Treaty of 1943 to be treated "in accordance with the principles of international law and practice"; and the execution of such treaty provisions is not dependent upon the maintenance of diplomatic relations. Nor can a demand made by Mao to the Nationalist Government of China on January 14, 1949, for the abrogation of "traitorous" or "unequal" treaties with foreign Powers ⁵⁸ be properly regarded as referring to the Treaty of 1943 since the purpose of that treaty was to terminate the régime of territoriality and to substitute therefor the jurisdiction of China over its nationals of the United States "in accordance with the principles of international law and practice."

Indeed, even in the absence of any treaty or diplomatic relation with an unrecognized *de facto* régime, modern international practice refutes the assumption sometimes made on the basis of a rigid conceptualism that *de facto* governments exist in a legal vacuum. Customary international law clearly establishes the international responsibility of a succeeding government for the acts of its predecessor, as well as for its own violation of international law. Thus, whether the Mao government succeeded to *de facto* Communist régimes in Manchuria and Shanghai or whether those local régimes were always part of the Communist régime which overran China and replaced the Nationalist Government, the international responsibility of the successful revolutionary government for violation of international law is clear. No support in practice is to be found for the presumption that an unrecognized *de facto* government may choose which rules of customary international law it will consent to treat as obligatory.

⁵⁵ *Loc. cit.*, p. 250.

⁵⁶ As to which see *id.*, pp. 241, 243-245, 247 ff.

⁵⁷ So far as the writer can determine, the Chinese Communist authorities declined to take cognizance of the official status of foreign diplomatic and consular representatives.

⁵⁸ This was one point of the 8-point statement of peace terms then set forth in the N. Y. Times, Jan. 28, 1949. See H. Arthur Steiner, "Mainsprings of Chinese Communist Foreign Policy," this JOURNAL, Vol. 44 (1950), pp. 69, 93 ff.

In conclusion, it appears to regard the mistreatment of international law, not practice. The practice consular officers have cry of function, and, in this case of 1943, which is neither a disguise, nor the cringing necessity for an "iron curtain" beyond the pale.

By way of postscript, the situation referred hopefully to relations with all foreign countries and mutual respect of territories the Chinese Communist be dependent upon convincing and willing to confer

²² United States Relations, p. 724; cf. Steiner, *loc. cit.*

THE DRAFT DECLARATION ON RIGHTS AND DUTIES OF STATES

CRITICAL REMARKS

BY HANS KELSEN

Professor of Political Science, University of California

I. GENERAL REMARKS

1. The International Law Commission, established by resolution of the General Assembly (November 21, 1947), has prepared a Declaration on Rights and Duties of States, in conformity with resolution 8 (II) of the General Assembly (November 21, 1947).¹ The question which arises concerns the legal nature of this Declaration. The Declaration was drawn up by the Commission as the text of a resolution adopted by the General Assembly. The preamble of this resolution contains the statement:

Whereas . . . it is . . . desirable to formulate certain rights and duties of States in the light of new developments of international law and in harmony with the Charter of the United Nations;
The General Assembly of the United Nations adopts and proclaims this Declaration on Rights and Duties of States

The procedure suggested by the International Law Commission for leading to a codification, that is to say, to a formulation of legal principles having binding force. By adopting and proclaiming the Declaration the General Assembly could only recommend to the Members that they accept the principles formulated in the Declaration as existing international law. The Committee of the General Assembly, to which the draft Declaration was referred, did not accept the procedure suggested by the International Law Commission. The Committee recommended a resolution² by the General Assembly

Considering that at the present time it has encountered some difficulties in formulating basic rights and duties of States in the light of the new developments of international law and in harmony with the Charter of the United Nations, and recognizing the need of continuing its work with regard to this subject,

¹ Report of the International Law Commission covering its First Session, 1949. General Assembly, Official Records, 4th Sess., Supp. No. 10, at p. 15; this JOURNAL, Supp., Vol. 44 (1950), p. 15.

² U.N. Doc. A/1196, December 3, 1949, p. 18.

the character of a codification when made the content of a convention and under the Charter, the General Assembly can bring about codification of the rights and duties of states only by adopting a convention, submitted to ratification by the Members and other States. Such an attempt should be made even at the risk that a draft convention might receive only few ratifications.

2. As pointed out, it is not very clear whether the principles laid in the draft Declaration on Rights and Duties of States are *formae de lege lata* or *de lege ferenda*. A "declaration on rights and duties of States" seems to be a declaration on the rights and duties which States have under existing general international law. Suggestions concerning the future development of international law are usually not presented as a "declaration." During the discussion of the draft Declaration in the Sixth Committee, the United States Delegation submitted a draft resolution whereby the General Assembly would commend the draft Declaration "to the continuing consideration of Member States, of international jurists and of jurists of all nations as a source of law and as a guide to its progressive development."⁵ The term "source of law" is a mere word of speech and has many different meanings. Principles or rules—formulated in the Declaration—are a "source of law" only if they are legally binding. Hence the Declaration could be a source of law only if it would be the content of a convention ratified by the contracting States or if it formulated only rules of existing law. A "guide to its progressive development" is something quite different from a source of law. A question arises which parts of the Declaration are formulated as rules of existing law, and which parts have the character of suggestions for the future development of international law.

Certain rights and duties formulated in the draft Declaration are not presently established by existing general international law, but are established by the Charter of the United Nations; as, for instance, the duty to settle disputes by peaceful means, formulated in Article 8 of the draft Declaration. Other rights and duties, formulated in conformity with the Charter, have a narrower scope than the corresponding right or duty established by general international law; as, for instance, the right of self-defense, stipulated in Article 12 of the draft Declaration. The duty to treat persons with respect for human rights and fundamental freedoms, laid down in Article 6 of the draft Declaration, even goes beyond the duties established by the Charter.

The Preamble of the Declaration refers three times to the Charter of the United Nations, and declares it desirable "to formulate certain basic

⁵ U.N. Doc. A/C.6/330. During the discussion of the Declaration in the General Assembly the representative of Cuba, too, suggested the Assembly should commend the principles formulated in the Declaration as a "source" of international law. This suggestion was rejected. U.N. Doc. A/P.V.270, pp. 66 ff., 165.

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THE DRAFT DECLARATION ON RIGHTS AND DUTIES OF STATES

During the discussions in the International Law Commission the Charter cannot impose obligations upon non-member States. It has only the character of particular international law created by some members. But it is not clear how the Commission interprets Article 2 (6) and whether the draft Declaration under the Charter establishes general or only particular international law. The texts of Articles 6, 8, 9, 10 and 12 of the Declaration seem to presuppose that the Charter establishes general international law. However, other provisions, and especially the fact that the obligation of the United Nations assistance in its action established by Article 2 (6) of the Charter, is intentionally not formulated as a duty of all States (though under Article 2 (6) of the Charter it could be considered as such), allow the contrary assumption.

The Preamble of the Declaration—"to formulate certain basic principles of States in the light of new developments of international law in harmony with the Charter of the United Nations"—is highly significant.

If the "new developments" did not lead to a new general international law, the rights and duties established by the old and still valid international law cannot be formulated "in the light" of these new developments. If the new developments lead to a new general international law, the rights and duties must be formulated in accordance with the new law, "in the light" of the developments. If the Charter does constitute a new general international law, the rights and duties of the Members of the United Nations, as rights and duties of all States of the United Nations, are rights and duties of all States of the United Nations. These rights and duties are already formulated and not formulated a second time in the Declaration; but if formulation must be identical with that in the Charter, and it is not, then the Commission must formulate them "in harmony" with the Charter. If the Charter does not constitute general international law, the rights and duties of Members of the United Nations which are not established by general international law must not be inserted in the Declaration.

The rights and duties of Members which are established by general international law must be formulated in accordance with general international law. If the Charter does not constitute general international law, the rights and duties of Members which are not established by general international law must not be inserted in the Declaration, the text of which was formulated with the intention of codifying general international law.

The International Law Commission in its formulation of the rights and duties of Members had to take into account the Charter of the United Nations. It is necessary to make it clear in the text of the Declaration whether the Commission considered that the Charter establishes general international law. If the Commission was of the opinion that the Charter constituted only particular international law, no reference to the Charter should have been made.

A technically correct formulation of "rights and duties of

possible only on the basis of
 between right and duty. It is
 own behavior and a right
 (physical or juristic) person
 mean only that there is no
 This, however, implies that
 from preventing the subject
 right to one's own behavior
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 specific sense of the term if
 in a certain way in relation
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 duty to behave in this way.)
 narrowest, technical sense if it
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 law upon other states.)

There is an incontestable
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stipulated; and these exceptions are frequently presented thus, for instance, Article 2 (4) of the Charter stipulates that Members shall refrain from the threat or use of force, in general terms, because the wording comprises also the use of force in self-defense and other cases where, under the Charter, the use of force is not forbidden to use force. The duty to which Article 2 (4) refers is formulated: "All Members shall refrain in their international relations from the threat or use of force . . . except in case of individual or collective self-defense against armed attack (and other cases provided for in Articles 107 and 53)." These exceptions are frequently, under the Charter, presented as rights. What is called "right of self-defense" stipulated in Article 51 of the Charter, is nothing but the duty stipulated in Article 2 (4).

Hence the principles of international law which the Declaration of Principles and Duties of States intends to formulate could—and should—be formulated only in terms of duties. If for some reason or another it is desired to conform with the usual terminology, not only duties but also corresponding rights are to be formulated, the duties shall be primary and the rights secondary. For the duty is the primary, the right is secondary. The idea of a primacy of the right over the duty, especially in connection with certain rights which are pre-existent to the duties to be established, is a fallacy due to the natural law doctrine which stresses on the rights because one of its most important aims is the restriction of the legal power of the government. In argument in the Report of the International Law Commission on the Draft Declaration is restricted to the formulation of "four rights" is not correct. In formulating the four rights the Commission has also formulated the four duties, and in formulating the ten duties it has also formulated the four rights. To formulate some principles as duties and others as rights is a inconsistency which may lead to formulations which partly contradict each other. Thus, for example, the "right of independence" formulated in Article 1 of the Declaration, is the reflection of, because implied by, the duty to refrain from intervention, stipulated in Article 3, and the duty to refrain from the threat or use of force against the territorial integrity or political independence of another state, stipulated in Article 4, and the right of self-defense stipulated in Article 12 of the Declaration. The Declaration laid out, nothing but a restriction on the duty laid down in Article 3, could be presented as such. The duties presupposed by the Declaration are the right of jurisdiction (Article 2) and by the right to equality (Article 1) discussed in connection with the analysis of those articles. The Declaration is usual to present as principles of international law certain principles concerning the creation of international law, such as the

that international law is created by custom and treaties, that by treaties only duties and rights of the contracting parties are created, and the like. These principles cannot be formulated as duties or rights of the states, since they refer to the general conditions under which duties and rights of the states come into existence. A state has a duty to behave in a certain way and another state has a corresponding right, if this duty is established by custom or by a treaty to which the state is a contracting party. Since these principles cannot be formulated in terms of duties or rights of states, the draft Declaration does not contain them, although some of them, *e.g.*, the principle that by a treaty only duties and rights of the contracting parties are established, are of great importance. In view of the fact that this principle, although it does not constitute a duty or a right of states, refers at least to the duties and rights of states, it would be advisable to insert it into the Declaration, at the beginning or the end of the instrument.

II. COMMENTS

PREAMBLE

Whereas the States of the world form a community governed by international law,

Whereas the progressive development of international law requires effective organization of the community of States,

Whereas a great majority of the States of the world have accordingly established a new international order under the Charter of the United Nations, and most of the other States of the world have declared their desire to live within this order,

Whereas a primary purpose of the United Nations is to maintain international peace and security, and the reign of law and justice is essential to the realization of this purpose, and

Whereas it is therefore desirable to formulate certain basic rights and duties of States in the light of new developments of international law and in harmony with the Charter of the United Nations,

The General Assembly of the United Nations adopts and proclaims this *Declaration on Rights and Duties of States*

The first four paragraphs of the Preamble have nothing to do with the subject of the Declaration. The fifth paragraph, as pointed out in the general remarks above, is problematical because the meaning of the phrases "in the light of new developments" and "in harmony with the Charter" is not clear. The Preamble should contain a reference to Article 13, paragraph 1(a), of the Charter and, if the duties and rights of states established by the Charter are to be brought into relation to the duties and rights to be formulated in the Declaration, a statement concerning the meaning of Article 2 (6) of the Charter.

The term "basic" in the fifth paragraph should be dropped. "Basic" is another word for "fundamental"; and the theory that there are "funda-

mental" rights and duties of states under general international law in the sense that the principles establishing these rights and duties have a greater obligatory force than others, has no basis in positive international law.

ARTICLE 1

Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government. ✓

The statement that "every State has the right to independence" is hardly correct. Independence is not a right, it is an essential characteristic of the state. If a community is not "independent," it is no state. Every state has the right that the other states respect its existent independence, which means that they have the duty not to prevent by the threat or use of force another state from exercising the powers this state has under international law; which right is covered by the duty laid down in Article 9 of the Declaration. The idea, correctly expressed in that article by the words "threat or use of force," is expressed in Article 1 by the term "dictation." There is no sufficient reason—and it is a bad legal technique—to express the same idea in the same legal instrument by different terms.

ARTICLE 2

Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law. ✓

Jurisdiction in the widest sense of the term is the power to create and apply the law. Since the law regulates human behavior by imposing duties and conferring rights and competences upon persons, jurisdiction can be exercised only over persons; over things only indirectly, by regulating the disposition of things by persons. It is not clear what is meant by the statement that the state has the right to exercise jurisdiction "over its territory," probably not the right to dispose of its territory. This right is usually not understood by the right of jurisdiction. The discussion of this subject in the International Law Commission allows the assumption that by "jurisdiction over its territory" jurisdiction exercised *in* its territory was meant. If so, the words "over its territory" are redundant and misleading. As far as the jurisdiction of a state over persons (and through persons over things) is concerned, the territory of a state is of importance insofar as the jurisdiction of a state over persons (and indirectly over things) is different, depending on whether the persons (and things) are within its territory or abroad. What is essential is that a state has an *exclusive* right to exercise jurisdiction *in* its territory over all persons (and things) thereon; which means that no other state is permitted to exercise jurisdiction in this territory, except with the consent

of the former. This is a generally recognized principle of international law. If it is to be formulated as a "right," it is necessary to characterize it as a right of *exclusive* jurisdiction, as expressed in Article 7 of the Panamanian draft. It is true that a state has jurisdiction over its citizens abroad; that is to say, the state has the power to enact general as well as individual rules regulating the conduct of its citizens abroad, so that jurisdiction of a state over foreigners residing in its territory is not exclusive. But the *exercise* of jurisdiction is exclusive, insofar as a state is allowed to exercise jurisdiction over its citizens only in its own territory. This exclusive right is the reflection of the duty of other states to refrain from the exercise of jurisdiction in the territory of a state, except with the consent of that state. This duty is implied in the duty of a state to respect the territorial integrity of other states, which comprises not only the duty to refrain from the threat or use of force against the territorial integrity of another state (Article 9 of the Declaration), but also the duty to refrain from performing acts of jurisdiction (usually called acts of sovereignty) in the territory of another state. If a state in the territory of another state performs, without the latter's consent, an act of jurisdiction not constituting any threat or use of force, for instance, an act of investigation, it violates its duty to respect the territorial integrity of the other state, without violating the principle formulated in Article 9.

ARTICLE 3

✓ Every State has the duty to refrain from intervention in the internal or external affairs of any other State.]

Intervention in the internal or external affairs of another state constitutes a violation of the independence of that state. If Article 3 is to be interpreted in conformity with existing general international law, "intervention" means dictatorial intervention, that is, intervention by the threat or use of force. Hence, the duty formulated in Article 3 is covered by the duty laid down in Article 9 to refrain from the threat or use of force against the political independence of another state, and Article 3 is redundant.

ARTICLE 4

✓ Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife.]

No comment.

ARTICLE 5

✓ Every State has the right to equality in law with every other State. ✓

It is not correct to speak of a "right to equality." The principle of equality of states, i.e., the principle that all states are equal, cannot be

formulated as the right to equality. Law is regulation of human behavior. Hence a right necessarily refers to behavior, to the behavior of the person who has the right, or to the behavior of another person. What is meant by the right to equality is the right of a person to be treated by other persons, especially by the law-applying organs of the community, in a certain way. It is generally admitted that the principle of "equality before (or in) the law," which Article 5 formulates as the "right to equality," does not mean that the law must impose the same duties and confer the same rights upon all persons without distinction; that the law must not treat different categories of persons in different ways. There exists a *political* principle that certain differences, as differences in sex, religion or race, do not justify a different treatment by the law. But as to the extent to which this principle is realized, the positive legal orders differ very much; and the principle of equality before the law is independent of the extent to which the political principle that certain differences shall be ignored by the law-maker is realized in a positive legal order. The principle of equality before the law does not refer to the formation of the law but to the *application* of the law by the organs of the legal community. It means that in applying the law only those differences shall be regarded which are recognized in the law itself. The principle of equality before the law means nothing else but application of the law in conformity with the law. As such it is tautological.

General international law does not institute special organs for its application. The rules of general international law are to be applied by the states subjected to this law. The declaration that each state has the right to be treated by other states in accordance with the principle of equality before the law, means nothing but that states have the duty to behave in relation to other states in conformity with general international law, a statement which is superfluous because it is implied in the concept of an international law. Besides, to formulate this principle as a right of the state to equality, is misleading; for it could be misunderstood to mean that each state has the duty to treat all other states in an equal way, so that a state would violate this duty if it should grant, by a treaty, to a certain state a right without granting this right to other states. There can be no doubt that no such duty is established by general international law. Hence Article 5 is meaningless or misleading.

ARTICLE 6

Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion.

This article has no basis in general international law, which leaves at least the treatment of their own citizens to the discretion of the states. Nor has Article 6 a basis in the Charter of the United Nations which does

not impose upon the Members the duty to treat all persons under their jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion.

ARTICLE 7

Every State has the duty to ensure that conditions prevailing in its territory do not menace international peace and order.

This article has no basis in general international law insofar as it goes beyond the provision of Article 4 of the Declaration. Under general international law, no state is authorized to resort to reprisals or war against another state only because the "conditions prevailing in its territory . . . menace international peace and order." Besides, it would not be advisable to establish such a duty as formulated in Article 7 without instituting an authority competent to ascertain in an objective way that the conditions prevailing in a certain state do menace international peace and order. It is doubtful even whether such a duty exists under the United Nations Charter; it is certainly not established by the Principles laid down in Article 2 of the Charter. The statement in the Preamble of the Charter—"to establish conditions under which justice and respect for the obligations arising from treaties . . . can be maintained"—refers to an aim of the Organization, but does not constitute an obligation of the Members to ensure that such conditions prevail in their territories. The formula "international peace and order" is objectionable. It is not clear what is meant by "order." If order means "law," then the latter term should be used; and if it does not mean law, it has no legitimate meaning at all. Besides, "peace and order" is a pleonasm, for under general international law peace is to be maintained by compliance with that order which is the law.

ARTICLE 8

Every State has the duty to settle its disputes with other States by peaceful means in such a manner that international peace and security, and justice, are not endangered.

This article formulates a duty of all the states of the world only if the United Nations Charter, in virtue of its Article 2 (6), has the character of general international law. If such a duty should be established independently of the Charter, it would be advisable to substitute the words "international law" for the words "international peace and security, and justice," for international security is maintained when international peace is maintained, and international peace is to be maintained only by obedience to international law. To establish a duty of states to comply with justice, does not strengthen, but rather weakens their duty to comply with the law, since justice—or what the states consider to be justice—may be in conflict with the positive law. In that case, the provision concerned is a welcome pretext not to comply with the law.

ARTICLE 9

Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order.

This article formulates a duty of all the states of the world only if the Briand-Kellogg Pact and the United Nations Charter have the character of general international law. But even if this is presupposed, the first part of the article formulating the duty "to refrain from resorting to war as an instrument of national policy" should be dropped because this duty is completely covered by the duty formulated in the same article "to refrain from the threat or use of force against the territorial integrity or political independence of another State." Article 2 (4) of the Charter, from which this formulation has been taken over, goes far beyond Article 1 of the Briand-Kellogg Pact. The words "or in any other manner inconsistent with international law and order" are superfluous, too, as the formula "to refrain from the threat or use of force against the territorial integrity or political independence of another State" implies any possible threat or use of force against another state inconsistent with international law. If, by a convention to be ratified by all the states of the world, a duty to refrain from the threat or use of force against other states should be established, it would be advisable to substitute for the formula "inconsistent with international law" a clear determination of the conditions under which threat or use of force against another state is not forbidden by international law, especially the case of self-defense; for instance, as follows: Every state has the duty to refrain from the threat or use of force against another state except in case of self-defense against an illegal use of force.

The last two words of Article 9—"and order"—should be dropped. The international "order" that comes into consideration in a formulation of duties and rights of states under international law, is the international law.

ARTICLE 10

Every State has the duty to refrain from giving assistance to any State which is acting in violation of Article 9, or against which the United Nations is taking preventive or enforcement action.

The first clause of this article is covered by Article 9, and hence is redundant. If a state assists another state which is acting in violation of the law, it participates in an illegal action, and its duty to refrain from illegal actions is implied in the concept of international law. The second clause of Article 10 obviously constitutes a duty of every state only if the Charter of the United Nations has the character of general international

law; if it has not, every state has the duty to refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action only if this action is in conformity with general international law. But the Charter authorizes the Security Council to take enforcement action against a state not only in case an enforcement action by one or several states against another state is permitted by general international law. Article 39 authorizes the Security Council to take enforcement action for the purpose of maintaining or restoring peace whenever and against whomever the Security Council deems it necessary. If Member States of the United Nations, under the direction of the Security Council, use force against a non-member state which has not violated the law, other non-member states may assist the state against which the enforcement action is directed without violating international law.

ARTICLE 11

Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of Article 9.

It is not very clear what the states are obliged not to recognize. Article 11 refers to a territorial acquisition by a state acting in violation of its duty to refrain from the threat or use of force. Does that mean only the actual occupation of the territory (which is not identical with its "acquisition"), or does this formula include also the case in which the state, acting in violation of its duty, has concluded a treaty of cession with the state against which this action was directed? And also the case in which the state, acting in violation of its duty and without concluding such a treaty, has firmly established and, during a certain period of time, maintained its domination over the territory? In both cases, under general international law, an acquisition of the territory takes place, in spite of the illegality of the act which has led to the acquisition. What does it mean, that a state has the duty to refrain from "recognizing" a territorial acquisition by another state? The answer to this question depends on the effect which the recognition by one state of the territorial acquisition of another state has within the meaning of Article 11. If such recognition has only a declaratory character, the duty formulated in Article 11 is legally worthless. Then, non-recognition of a territorial acquisition has merely political importance. If recognition of a territorial acquisition is supposed to have a constitutive character, that is to say, that no state can acquire territory from another state without recognition on the part of third states, Article 11 has no basis either in general international law or in the United Nations Charter. Under general international law, the acquisition of a territory by one state from another state concerns directly the relation between these two states, and only indirectly the relation to other states. No recognition by third states is required to bring about acquisition of territory by one state from another. The main

question is whether under general international law the acquisition of territory by an act constituting a violation of international law is possible. And it can hardly be denied that this question is to be answered in the affirmative, especially with respect to the acquisition of territory by illegal use of force. The principle *ex injuria jus non oritur* is not—or only with important restrictions—a principle of positive international law. It is essentially restricted by the principle of effectiveness, prevailing within general international law; and, by a treaty concluded between the states directly concerned, acquisition of territory through illegal use of force may subsequently be validated. Even under the Charter of the United Nations, acquisition of territory by an act of force constituting a violation of the Charter, is not excluded. Besides, the principle that an illegal act cannot have the legal effect intended by the illegally acting person, is hardly applicable in a satisfactory way under a legal order which—as general international law—does not institute an objective authority to decide the almost always disputed question whether an illegal act has occurred and who is responsible for it.

As to the United Nations Charter, it should be noted that the obligation imposed upon the Members by Article 2 (4) to refrain from the threat or use of force against the territorial integrity of any state, does not suffice to exclude acquisition of territory by an act constituting a violation of this obligation. The consequences which the Charter provides for a violation of Article 2 (4) are expulsion from the Organization and enforcement measures by the Security Council. There is no provision in the Charter precluding acquisition of territory by a state acting in violation of Article 2 (4). If a war breaks out between two Members, and the Security Council does not, for one reason or another, intervene, this war may lead to the acquisition of territory by the victorious state, in spite of the fact that this state was not exercising its right of self-defense under Article 51. It should not be overlooked that the question as to whether the use of force in a concrete case is or is not in conformity with the Charter, remains undecided as long as the Security Council does not intervene by determining the existence of an illegal breach of the peace. It should not be overlooked, further, that the Council under Article 39 is not bound, in case force is used in the relations between two states, to decide which of the states is acting in conformity and which in violation of the charter, but that the Council is only authorized in such a case to restore peace. The Council may very well recommend or enforce an adjustment that is not in conformity with existing international law, if it considers such an adjustment necessary for the restoration of peace. In case of a territorial conflict, the Council may very well, in order to restore peace, recommend or enforce the acquisition of a territory on the part of the state which acted in violation of Article 2 (4). The provision of Article 24 that the Security Council in discharging its duties shall act in accordance with the purposes and

he term "collective self-defense," taken over from Article 51 of the Charter, is not correct. The assistance of an armed attack, by a state which is not attacked, is defense of another. Terminological mistakes should not be repeated in subsequent instruments of international law.

ARTICLE 13

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.

Since the terms "duty" and "obligation" are synonymous, Article 13 stipulating a duty to carry out obligations in good faith, it is superfluous to provide that obligations must be carried out, because this is implied in the word "duty." The Report of the International Law Commission states that Article 13 restates the principle *pacta sunt servanda*. This principle, correctly formulated, is that treaties create legal facts and that a treaty has the legal effect of creating rights and obligations for the contracting parties—and *only* the contracting parties—in relation to the treaty. This principle is not, or not fully, formulated in Article 13. It could be formulated, e.g., "Treaties are binding on the states which have contracted with the treaty, and *only* these states, have the duty to carry out the provisions of the treaty in good faith." The words "in good faith" are superfluous. A treaty cannot be "carried out" in bad faith. If the bad faith is in the external behavior of the state, it is irrelevant, and if it is in the internal behavior, the treaty is not "carried out." The principle in question is, according to a widespread view, subject to certain exceptions. Such exceptions are: treaties of cession, treaties of *trattato di cessione*, and certain treaties by which obligations are conferred upon third states not contracting parties, such as treaties of alliance, treaties of confederation, treaties of a new state conferring obligations and rights upon third states, treaties by which a state servitude is established, imposing obligations upon states which succeed to the territory, and treaties of cession. If it is intended to insert into the Declaration the principle *pacta sunt servanda*, these exceptions must be formulated. A particularly important question is whether the principle is intended to constitute a universal community of states in which the overwhelming majority of states are contracting parties. If so, the principle obliges and rights of states not yet contracting parties. The principle on rights and duties of states proclaimed in the Declaration can hardly avoid an answer to that question. The second part of Article 13 is not very clear. It refers to the conflict between international and national law. The principle in such a conflict the provisions of its national law must be applied.

from its obligations under international law may not "invoke" provisions of its own law of its obligations under international law sides, it is useless to forbid a state to invoke of this law with international law. When a vocation has no legal effect. This is the existing international law that provisions contrary to (customary or contractual) international law state from its obligations under the latter. of the principle which the second part of A

ARTICLE 14

Every State has the duty to conduct its relations with other States in accordance with international law, so that the sovereignty of each State is not affected by international law.

This article is entirely superfluous. The sovereignty of each state is subject to the law of international law, which is implied in the first statement that every state has the duty to conduct its relations with other states in accordance with international law. This duty is implied in the concept of international law. This duty is not quite correct, because by an international agreement, a state may be bound in its relations with other states, but also its relations with its own citizens, in a certain way. This is of secondary nature. The formulation of this duty to mean that by international law only the relations between a state and individuals, and not the relations of international law implies the duty of international law in accordance with international law possible relations among states, as well as the relations between states and individuals.

The second part of Article 14 is object of the "sovereignty." In its original and only meaning, it means supreme authority. As such sovereignty is not a part of international law, states having duties under international law. If sovereignty does not mean supreme authority, probably does in Article 14, the legal power of international law, the term should better be avoided in international law. If such an instrument speaks of this term in a way compatible with international law, that it recognizes sovereignty as an essential part of international law, that it must be interpreted under this principle, no conclusions might be drawn from the "sovereignty" to privilege the duties formulated in the instrument.

THE CASE OF HYDERABAD BEFORE THE SECURITY COUNCIL

BY CLYDE EAGLETON

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On the agenda of the Security Council, and regularly listed by Secretary General among the "matters of which the Security Council seized" is the item "Question of Hyderabad." No action has been taken by the Security Council on this item, further than keeping it on the agenda; the case has been presented but not discussed. Various interesting questions of international law and of the constitutional law of the United Nations are raised by this situation, which is thus far the failure of the United Nations. Equally as interesting political questions are involved, which have in fact had more weight than the legal questions. Only the latter will be considered in this discussion.

I. SUBMISSION OF THE CASE

The complaint of Hyderabad was presented in a cablegram dated August 21, 1948, addressed to the President of the Security Council and read as follows:

¹ The political situation may be compactly summarized in a quotation from Coupland:

"If no more than the Central Indian States and Hyderabad were excluded from the Union, the United Provinces would be almost completely cut off from Bombay and completely from Sind. The strategic and economic implications are obvious. . . . India could live if its Moslem limbs in the North-West and North-East were cut off, but could it live without its heart?" (Quoted from Government of India Paper on Hyderabad, 1948, p. 3.)

A short discussion of this aspect of the question may be found in Phillips Talbot, "Hyderabad and the United Nations," in *World Politics*, Vol. 1 (1949), pp. 321-322.

There is little doubt that Hyderabad must be part of India; and the political situation may therefore be impatient with the "legalism" of this article. After all, the Security Council is a political body. However, the Security Council failed as much in the political sense as in the legal sense to act; it simply made no attempt to solve the problem put before it. I believe, therefore, that I am justified in saying that this case the worst failure of the United Nations—whether looked at from a political or a legal viewpoint. The use of force by India was unnecessary; she could have reached a satisfactory solution without this violation of the Charter. A solution could have been reached by the Security Council at the time of the intervention of India in May, 1949.

The Government of Hyderabad, in reliance on Article 35, paragraph 2, of the Charter of the United Nations, requests you to bring to the attention of the Security Council the grave dispute which has arisen between Hyderabad and India, and which, unless settled in accordance with international law and justice, is likely to endanger the maintenance of international peace and security. Hyderabad has been exposed in recent months to violent intimidation, to threats of invasion, and to crippling economic blockade which has inflicted cruel hardship upon the people of Hyderabad and which is intended to coerce it into a renunciation of its independence. The frontiers have been forcibly violated and Hyderabad villages have been occupied by Indian troops. The action of India threatens the existence of Hyderabad, the peace of the Indian and entire Asiatic Continent, and the principles of the United Nations. The Government of Hyderabad is collecting and will shortly present to the Security Council abundant documentary evidence substantiating the present complaint. Hyderabad, a State not a Member of the United Nations, accepts for the purposes of the dispute the obligations of pacific settlement provided in the Charter of the United Nations.

It is understood that the submission of the present complaint does not prejudice the submission of the dispute to the General Assembly.²

This was followed by a cablegram dated September 12, 1948, in which the Government of Hyderabad, in view of the "officially proclaimed intention of India as announced by its Prime Minister to invade Hyderabad," asked that the complaint be put upon the agenda at "the earliest possible date such as Wednesday, fifteenth September." On the following day (September 13) a cablegram informed the Secretary General that Hyderabad had been invaded.³

Assuming for the moment that Hyderabad was a state, it had a right, though not a Member of the United Nations, to bring before the Security Council a dispute to which it was a party, provided it accepted in advance the obligations of pacific settlement in the Charter, for the purposes of that dispute. The mere presentation of the plea did not, of course, bind the Council to consider it; the Council could decide for itself its own competence and its own duties with regard to such a request.⁴ The complaint of Hyderabad came before the Council at its 357th meeting in Paris on Thursday, September 16, 1948, Sir Alexander Cadogan (United Kingdom)

² U.N. Doc. S/986, Security Council, Official Records, 3rd Year, Supp., September, 1948, p. 5.

³ U.N. Docs. S/998 and S/1000, *ibid.*, pp. 6, 7. The Secretary General, doubtless uncertain as to the status of Hyderabad, preceded each of these documents with the words: "The Secretary General, not being in a position to determine whether he is required by the rules of procedure to circulate this communication, brings it to the attention of the Security Council, for such action as the Council may desire to take."

⁴ L. M. Goodrich and E. Hambro, *Charter of the United Nations: Commentary and Documents* (2nd and rev. ed., Boston, 1949), p. 239, and discussion under Art. 35; A. Salomon, *L'O.N.U. et la Paix* (Paris, 1948), p. 113; C. Eagleton, "The Jurisdiction of the Security Council over Disputes," this JOURNAL, Vol. 40 (1946), pp. 520-522.

being President at that time.⁵ The question before the Council was the adoption of the provisional agenda, prepared by the President and the Secretary General, and including the complaint of Hyderabad. Mr. Tsiang (China) asked that the Hyderabad case be postponed until Monday, since he was without instructions from his government. The President was inclined to think that the matter was too urgent to delay. Mr. Jessup (U.S.) felt that the agenda could be adopted "without in any way prejudging the competence of the Security Council or any of the merits of the case." The Chinese delegate argued that admission to the agenda "does imply a certain view as to the juridical status of the parties to a dispute," but was willing to have discussion provided that "a formal decision regarding the adoption of the agenda should be postponed."

Sir Alexander Cadogan then replied to an earlier request of the Soviet delegate as follows:

I can inform the Security Council that on 15 August 1947 the suzerainty of the Crown in the United Kingdom over Hyderabad, and all other Indian States, came to an end. None of the powers previously exercised by the Crown was transferred to the Government of the two new Dominions, that is, India and Pakistan. Hyderabad has not subsequently acceded to either of those Dominions, but on 29 November 1947 the Nizam entered into a "standstill" agreement with the Government of India for a period of twelve months. One effect of that agreement was to place, during its currency, the conduct of Hyderabad's external relations in the hands of the Government of India. There have been frequent allegations on both sides of breaches of the agreement, but there has been no resort to the arbitration for which provision was made in the "Standstill Agreement."

When the President put to a vote the question as to whether there should be an adjournment until Monday, there was one vote in favor and ten abstentions. Since a majority had not been obtained, the motion failed; and the President then put to a vote the motion of Argentina that the provisional agenda be adopted, with the understanding that its acceptance "would not decide or affect the question of the Security Council's competence." By a vote of eight for, and three abstentions, the agenda was adopted. In accordance with previous precedent, the President then invited Sir Ramaswami Mudaliar, representative of India, and Nawab Moin Nawaz Jung, representative of Hyderabad, to take seats at the Council table.

Nawab Moin presented his case over some pages, which may be summed up in his own words as follows:

Our case is that the United Nations is confronted with the most determined and most serious onslaught on its principles since the Organization was set up; that this breach of the Charter is not the result of a sudden eruption of passion but is due to a premeditated plan, the

⁵ S.C., O.R., 3rd Year, No. 109, 357th meeting, Sept. 16, 1948.

implications of which have been carefully weighed and deliberately accepted; that the action taken by the Dominion of India constitutes a denial of the principles of independence and equality, as laid down in the Charter; that the cause of Hyderabad has now been identified with those principles; that it is within the province and in the power of the United Nations to prevent the accomplishment of the criminal design; and that action—swift, authoritative and determined—must be taken to prevent and to stop this threat to international peace and justice.

He urged that time was limited and every hour counted; and went on to say:

The situation demands immediate action by the Security Council not only under Chapter VI of the Charter relating to the peaceful settlement of disputes, but also under Chapter VII which bears on the action of the Security Council for enforcing its decisions for safeguarding the peace of the world. In that Chapter, Article 39 of the Charter enjoins on the Security Council the duty to determine the existence of any threat to the peace, breach of the peace, or act of aggression, and that it shall take appropriate action. Who can doubt that these conditions are now present?

To this complaint, Sir Ramaswami Mudaliar, on behalf of India, replied that he would not go into the merits or demerits of the allegations made, since Hyderabad had no right to appear before the Security Council at all. He said:

In my Government's view, Hyderabad is not competent to bring any question before the Security Council; that it is not a State; that it is not independent; that never in all its history did it have the status of independence; that neither in the remote past nor before August, 1947, nor under any declaration made by the United Kingdom, nor under any Act passed by the British Parliament, has it acquired the status of independence which would entitle it to come in its own right to present a case before the Security Council.

He asked for time until Monday, when he would present documents and state his case.⁶ When Monday came, however, Hyderabad had surrendered (we shall return to this below) and the Council, naturally, in uncertainty, postponed action—indefinitely, as it has turned out. Looking ahead, however, for a moment, we find Sir Benegal Rau, then the representative of India, taking the same position at a Security Council meeting in May, 1949, and quote from his words as follows:

Hyderabad was not a State in the international sense before the Indian Independence Act; she is not one now by virtue of the Stand Still Agreement and the arrangements which followed it; and she cannot be one at any time in the future if India is to live. We cannot defy or ignore geography. It follows that any dispute with Hyderabad is not an international dispute. All matters relating to Hydera-

⁶ *Ibid.*, pp. 10, 12-13, 18-19.

bad are now dealt with regularly by the Government of India as matters of domestic concern.⁷

Several questions arise as to the legal status of Hyderabad. Is it a sovereign state? Was it at any time a part of India? Did Hyderabad seek to remain independent? Was the matter a domestic question under Article 2, paragraph 7, of the Charter?

II. THE QUESTION OF COMPETENCE

The International Status of Hyderabad

The legal status of the several hundred "Princely States" of India has always been a matter of curiosity and debate among students of international law. Cases such as *Mighell v. Sultan of Johore*⁸ or *Duff Development Co. v. The Government of Kelantan*,⁹ in which the States concerned were held to be sovereign states, are well known to them, as is also the question whether courts other than British courts would have rendered the same judgment. It is, however, unnecessary to enter into this debate, for whatever limitations may have existed upon the sovereignty of Hyderabad, they were limitations imposed by Britain, not by India; they were rights of Britain, not of India. India had, and could have, no jurisdiction or claim whatever over Hyderabad for the simple reason that there was no India, as a state, before 1947. Hyderabad was part of a geographical area known as India, but she was not part of a non-existent state of India; nor could the newly-created state of India claim to have had rights or paramountcy over Hyderabad before India existed as a state; nor could India claim by right of succession rights which were not transferred to her by the previous ruler.

Hyderabad was at one time a part of the Mogul Empire, and became independent of it in the eighteenth century, after the breakdown of that empire. Gradually, through a succession of treaties, Britain increased her control over Hyderabad in various ways, which finally came to be expressed in the term "paramountcy."¹⁰ The paramount powers were exercised

⁷ S.C., O.R., 4th Year, No. 28, 425th meeting, p. 7. This statement ignores the effect of the Indian Independence Act which, as we shall see, authorized independence for the Princely States if desired. The "Stand Still Agreement" did not grant independence, but confirmed it implicitly; and "the arrangements which followed it" were invasion and military government. Nor does it follow from the facts of geography that Hyderabad should legally be regarded as a domestic concern by India.

⁸ L.R., [1894] 1 Q.B. 149.

⁹ In which the House of Lords said: "It is obvious that for sovereignty there must be a certain amount of independence, but it is not in the least necessary that for sovereignty there should be complete independence." L.R., [1924] A.C. 797.

¹⁰ A vague term by which Britain sought to reconcile her admission of the sovereignty of the Princely States with the actual fact of her control over them. As to the status of the "Princely States," see Taraknath Das, *Sovereign Rights of Indian Princes*

by the Viceroy, and in the form of advice and direction to the Government of Hyderabad, of which the Nizam was the head. The controls exercised over Hyderabad were exclusively British; what, then, was the position of Hyderabad when Britain relinquished her position of paramountcy?

Effect of the Indian Independence Act

In various official acts and statements, the British Government made its intentions clear. As far back as the Government of India Act of 1935,¹¹ the claim of the Indian States (as distinguished from the parts of India ruled directly by Britain) was recognized, and promises were made that paramountcy functions would not be transferred to a self-governing India save with the consent of these States. In preparing for the Indian Independence Act of 1947, it was again said,¹² "The British Government could not and will not in any circumstances transfer paramountcy to an Indian Government." The Act itself says (Section 7b):

The suzerainty of His Majesty over the Indian States lapses, and with it all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of the Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date or in relation to Indian States by treaty, grant, usage, sufferance or otherwise.¹³

Nowhere in the Act are any such rights or functions transferred to any other state; they simply lapse.

Other official statements show that the intention of the British Government was that the Princely States should be left free to join either with India or with Pakistan, or to remain independent; though with such statements there was usually coupled the fervent hope that these States would choose to join with one or other of the two new Dominions. Thus, for example, Lord Listowel, Secretary of State for India, said in the House of Lords July 16, 1947:

From that moment the appointments and functions of the Crown Representative and his officers will terminate and the States will be the masters of their own fate. They will then be entirely free to choose

(Madras, 1925); E. Thompson, *The Making of the Indian Princes* (Oxford, 1944). In an article in this JOURNAL, Vol. 43 (1949), pp. 57-72, Dr. Das argues that paramountcy belonged always to the Government of India, whatever authority that might be at a given moment.

¹¹ 26 Geo. 5, Ch. 2 (Aug. 2, 1935).

¹² In the Memorandum by the Mission on States' Treaties and Paramountcy, 1946, Cmd. 6835. This was repeated by the Prime Minister July 10, 1947, House of Commons, Official Report, 439 H.C. Deb. 55, c. 2451; and by the Secretary of State for India on July 16, 1947, House of Lords, Official Report, 150 H.L. Deb. 5s, c. 811.

¹³ 10 and 11 Geo. 6, Ch. 30 (July 18, 1947).

whether to associate with one or the other of the Dominion Governments or to stand alone, and His Majesty's Government will not use the slightest pressure to influence their momentous and voluntary decisions. But I think it can hardly be doubted that it would be in the best interests of their own people, and of India as a whole, that in the fulness of time all the States should find their appropriate place within one or the other of the new Dominions.¹⁴

Prime Minister Attlee, on July 10, 1947, made a similar statement:

With the ending of the treaties and agreements, the States regain their independence. But they are part of geographical India, and their rulers and peoples are imbued with a patriotism no less great than that of their fellow Indians in British India. It would, I think, be unfortunate if, owing to the formal severance of their paramountcy relations with the Crown, they were to be islands cut off from the rest of India.¹⁵

Finally, it is to be noted that in the "Stand Still Agreement" between India and Hyderabad of November 19, 1947, Article 3 said that "nothing herein contained shall include or introduce paramountcy functions or create any paramountcy relationship."¹⁶

In later debates, after the conquest of Hyderabad, members of Parliament strongly upheld the right of Hyderabad to make its own choice and denounced the Government for its failure to defend Hyderabad against India. Mr. Winston Churchill, for example, quoted a speech in which Mr. Nehru said "If and when we think it necessary, we will start military operations against Hyderabad State," and went on to say:

It seems to me that that is the sort of language which really might have been used by Hitler before the devouring of Austria—That speech does cause me the greatest anxiety, because if an act of aggression were committed by India, or by the Nehru Government of India, upon the independent State of Hyderabad, the British Crown and even the person of His Majesty would be involved, owing to the arrangements which have been made. . . . I warn Ministers that . . .

¹⁴ House of Lords, Official Report, 150 H.L. Deb. 5s, c. 812.

¹⁵ House of Commons, Official Report, 439 H.C. Deb. 5s, c. 2451.

¹⁶ Quoted from Government of India, White Book on Hyderabad, 1948, Appendix II; found also in the Hyderabad official documents, Hyderabad's Relations with the Government of India (Karachi, April, 1948), Vol. I, p. 27. The principal documentary sources of the two States on this question are as follows:

For India: White Paper on Indian States (Printed in India by the Manager Govt. of India Press, New Delhi, July, 1948); White Paper on Hyderabad, 1948.

For Hyderabad: Hyderabad's Relations with the Dominion of India (Prepared by the Government of His Exalted Highness, the Nizam of Hyderabad, and Berar, Printed at Burns Road, Karachi (which is really the first of three volumes); Vol. II, June, 1948; Vol. III, August, 1948). There are also two larger volumes, The Complaint of Hyderabad against the Dominion of India; and Appendices to the Complaint of Hyderabad against the Dominion of India. The latter two volumes were distributed to members of the Security Council (see S/1001).

they have a personal obligation which affects their honor and good faith not to allow a State which they have assured has a declared and sovereign status to be strangled, stifled, starved out, or actually overborne by violence.¹⁷

It is not denied by speakers for India that the Act of Parliament left the Princely States independent and transferred no paramountcy from Britain to India.¹⁸ An official document of India, the *White Paper on Indian States*, for example, says:

All that the Dominion Government inherited from the Paramount Power was the proviso to Section 7 of the Indian Independence Act, which provided for the continuance, until denounced by either of the parties, of agreements between the Indian States and the Central and provincial Governments in regard to specified matters, such as Customs, Posts and Telegraphs, etc.¹⁹

The Viceroy of India (Lord Mountbatten) in a farewell conference with the rulers of Indian States said to them that "the States have complete freedom—technically and legally they are independent."²⁰ And finally, a speaker for the Government of India, in its Parliament on March 15, 1948, recognized and confirmed this status:

In regard to them [major States unaffected by the movement for merger or union] the Government of India's policy is clear and unequivocal. There is no desire on our part, in any way, to coerce them into merger or integration. If they wish to remain as separate autonomous units, we would have no objection. . . .²¹

The representative of India, speaking in the Security Council on January 15, 1948, said:

On 15 August, when the Indian Independence Act came into force, Jammu and Kashmir, like other states, became free to decide whether she would accede to the one or the other of the two Dominions, or remain independent. It was, however, expected that the State would, as a matter of course, enter into relationship with one or the other of the Dominions, having regard to her geography and history, her economic interests and the wishes of her population.²²

¹⁷ House of Commons, Official Report, 454 H.C. Deb. 5s, c. 1726-1733, July 30, 1948.

¹⁸ Thus Dr. Das, though he argues that the Government of India Act of 1935 "did not provide for any change of status of Indian Princes in relation to the Suzerain Power, the Government of India," quotes the Cabinet Mission to India of 1946 "that the Indian States should be free to accede to either Pakistan or the Union of India, or to remain outside of both Dominions," and concludes that "by the Independence of India Act the Government of India was divested of paramountcy." Taraknath Das, "The Status of Hyderabad during and after British Rule in India," this JOURNAL, Vol. 43 (1949), pp. 68, 69, 70.

¹⁹ Government of India, *White Paper on Indian States*, p. 12. See pp. 3, 5, 6, 10 and elsewhere for similar statements.

²⁰ *Ibid.*, p. 49.

²¹ *Ibid.*, p. 26.

²² U.N. Doc. S/P.V. 227, p. 32; see also p. 86.

Recognition

In view of the above and other such statements, it seems beyond doubt that the British Government intended the Princely States to be free to choose independence if they so wished, and that this was officially recognized by the Government of India. This being so, Hyderabad assumed (if it had never been independent) or resumed (if it had been independent) the position of a sovereign state; in any case, it was a political entity disconnected from either Britain or India. Over this fully organized and stable government, there was no legal claim on the part of any outside authority. Sir Benegal Rau observed, however, that it had obtained recognition from no other state, and quoted Sir Hartley Shawcross as saying (July 14, 1947) that "we do not propose to recognize the States as separate international entities *on 15 August when the Bill comes into operation.*"²³

As to this point of recognition, several things may be said. Britain did authorize independence for these States, if they chose to take it under the Indian Independence Act, but she could not well extend formal recognition to them until she knew what their choice would be. Nothing in Sir Hartley's words would prevent later recognition; indeed, recognition should logically flow from the British position, in due course, for such States as might wish to remain independent. No Member of the United Nations could with propriety recognize a state whose status was at the moment before the Security Council for decision. Whether recognized or not, Hyderabad was an independent state, fully organized, of size and resources sufficient to entitle it to recognition according to usual standards of stability and willingness to meet international obligations.²⁴

However, the recognition of Hyderabad is an unimportant matter; the really important question is whether recognition should be given to the Indian conquest of and claim to title over Hyderabad. Through the Hoover-Stimson doctrine of non-recognition, the United States asserted that she would not recognize as legal changes brought about by the use of force contrary to treaty obligations, and that principle has been widely accepted since that time. It is indeed a fundamental principle of law in general: *ex iniuria ius non oritur*. The least that a Member of the United Nations could do is to refuse to recognize a conquest and absorption

²³ S.C., O.R., 4th Year, No. 28, 425th meeting, p. 6. Italics added.

²⁴ The formal document embodying the Complaint of Hyderabad puts forward an argument (p. 26) that recognition is merely declaratory of the existing fact of statehood, which apparently derives from the writings of Professor Lauterpacht. See his *Recognition in International Law* (Cambridge, 1947), Ch. III and *passim*. "Whether or not a government exists clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force, is a fact, not a theory." *Wulfsohn v. R.S.F.S.R.*, 234 N. Y. 372 (1923).

achieved in violation of the Charter of the United Nations. The United States has acted upon this principle with regard to the Baltic states, and in other situations; the Government of the United Kingdom apparently assumed, in the case of the Italian conquest of Ethiopia, that the rule of non-recognition applied and that she must therefore take steps to escape the binding force of the rule, so that she could recognize the Italian title.²⁵ It is justifiable to wonder why these states, and others, should not apply in the case of Hyderabad the principle which they have applied elsewhere.

In any case, recognition by individual states is not the test or condition of appearance before the Security Council; if it were, there might be some strange cases of confusion and cross-purposes. The Security Council decides for itself who may appear before it, and its own competence in general; it is not bound by the fact that this state or that state did, or did not, grant recognition. In practice it has heard entities of far more doubtful status than Hyderabad. On various occasions the representative of the Jewish Agency for Palestine was heard.²⁶ That an unrecognized and non-sovereign entity could appear before the Security Council seems to have been confirmed in the Indonesian case in which, incidentally, the representative of India argued for such a right. He said, among other things: "The distinction that I make is that there can be States without full sovereignty which are States for the purposes of Chapter VII of the Charter."²⁷ The representative of Australia asserted that "there is no provision in the Charter which says that, for the purposes of a State coming before the Council or participating in its discussions, it has to be a sovereign State."²⁸ The Security Council did in fact admit a representative of the Indonesians to the table for discussion of its case.²⁹ The precedents thus indicate that Hyderabad, whether sovereign or not, would be allowed by the Council to be heard.

A Domestic Question?

The representatives of India, as we have seen, maintained that the complaint of Hyderabad was not an international question; they also asserted that it was a "domestic question" under Article 2, paragraph 7, of the Charter, and that the United Nations could not therefore deal with it. This is a somewhat amazing feat of logic. It assumes that Hyderabad is a part of India, although, as has just been shown, there is no legal basis for such an assumption; it assumes also that India can decide the question and that,

²⁵ See the discussion in Lauterpacht, *op. cit.*, Ch. XXI, and his references to the Ethiopian case at pp. 343, 418.

²⁶ See U.N. Docs. S/P.V. 258, Feb. 27, 1948, pp. 2-35; S/P.V. 262, March 5, 1948, pp. 11-35; S/P.V. 274, March 24, 1948, pp. 47-51.

²⁷ S.C., O.R., 2nd Year, No. 74, 181st meeting, p. 1924. See also No. 67, 171st meeting, p. 1628.

²⁸ *Ibid.*, 181st meeting, p. 1930.

²⁹ S.C., O.R., 2nd Year, No. 74, p. 1940.

since she has decided it, the Security Council cannot hear the complaint of Hyderabad. As we have seen, India herself had interpreted the Indian Independence Act as meaning that Hyderabad could remain independent; the claim that the matter was now a domestic question would therefore mean that India claimed that Hyderabad had since that time become incorporated into India. Since this happened as the result of Indian invasions, the assertion would amount to an admission of aggression and a claim to title through conquest.

As Sir Zafrullah Khan said, the mere fact that independence has been destroyed (by force) does not make it a domestic question:

If that were so, then, after every annexation by one State or territory belonging to another State, once the annexation had been completed as the result of military action—I shall describe it in no harsher terms—the State that had gained the accession might say, “Well, this is now a domestic question. Today, it is a domestic matter. The territory is part of our territory and there is no trouble about it.”³⁰

To accept such a conquest as a domestic question under the Charter would be to negate the purposes of the Charter; its very assertion in these circumstances should arouse the Council to action. The assertion is all the more amazing in view of the vigor with which India denied the claim of South Africa that the treatment of Indians in her territory was purely domestic, and the claim of The Netherlands that the problems of her colonies were domestic matters. In both of these cases there was sound legal argument that the United Nations had no right to interfere; yet India insisted upon that right and prevailed. If these were not domestic matters, how could the situation of Hyderabad, which was no part of India at all, nor claimed to be a part until after conquest, be regarded as one in which the United Nations could not interfere?

III. NEGOTIATIONS WITH INDIA

The Attitude of Hyderabad toward Accession

Even before the Indian Independence Act went into force, Hyderabad had been considering becoming part of the proposed new state of India. She had, indeed, taken a leading part in the movement toward a federal India in 1935; and the decision to divide India put her into a position of great difficulty. This was expressed by the Nizam in a *Firman* of June 11, 1947:

The basis of division of British India is communal [*i.e.*, religious]. In my State, however, the two major communities live side by side and I have sought, since I became ruler, to promote by every means good and friendly relations between them. . . . By sending represent-

³⁰ S.C., O.R., 4th Year, No. 28, 425th meeting, p. 14.

atives to either of the Constituent Assemblies Hyderabad would seem to be taking one side or the other.³¹

The partition of India faced Hyderabad with the communal problem, and it was especially difficult since, with a population 85% Hindu, it was ruled by a Muslim government. Moslem and Hindu had, in spite of this, lived together peacefully in Hyderabad; now the Nizam must choose between a far-away Moslem state (Pakistan) and a Hindu state completely encircling it (India), or else remain independent of either. Furthermore, Hyderabad was the largest and most firmly established of the Indian States, and it was not willing to be simply incorporated into India, with no autonomy left to it.³²

The Nizam, on August 8—before the new state of India had been inaugurated—wrote to the Crown Representative (Lord Mountbatten, who a week later was to exchange this office for that of Governor General of the Dominion of India) a letter in which, while opposing organic union of Hyderabad with either of the new Dominions, he suggested a treaty covering the “three essential subjects of External Affairs, Defence and Communications”; and on September 18 he sent to Lord Mountbatten (now Governor General) “draft heads of agreement” for such a treaty. To this the new Governor General replied that his Ministry regarded the Instrument of Accession, which other Princely States had accepted, as being most generous and “would find it very difficult to offer any other Instrument to any other State.” Furthermore, he said, the proposed agreement “gives no legislative power to the Dominion, and this is an arrangement which they cannot accept.”³³

The Stand Still Agreement

The Nizam argued that such a grant of legislative power would mean the very accession to which he was opposed; it would be complete surrender. He was, however, willing to discuss any form of association between India and Hyderabad, short of absorption. On October 15, 1947, he offered a draft “Stand Still Agreement” which, after considerable modification was signed on November 29, 1947. Under its terms, the Arrangements concerning External Affairs, Defence and Communications were continued; India should not have the right to “send troops to assist the Nizam in the maintenance of internal order” or for any other purpose except in time

³¹ Hyderabad's Relations with the Dominion of India, p. 1.

³² The special position of Hyderabad was at various times acknowledged by the Governor General of India. On August 15, 1947, he said to the Constituent Assembly: “Hyderabad occupies a unique position in view of its size, population and resources, and it has its special problems.” At the same time, the Governor General consistently and firmly urged that it accede to India rather than remain independent. Complaint of Hyderabad, Volume of Appendices, p. 22. See also pp. 19–20, 29.

³³ Complaint of Hyderabad, Appendices, pp. 16, 23–28, 29.

of war; by Article 3, "nothing herein contained shall include or introduce Paramountcy functions or create any Paramountcy relationship"; and finally, any dispute under the Agreement should be referred to arbitration. It was to continue for one year, that is, until November 29, 1948.³⁴

The purpose of this important document was to allow time for negotiations; and the Governor General expressed the hope that "before the present agreement expires, it will be possible for Hyderabad to accede to the Dominion of India." He asserted also that "it is the earnest desire of the Government of India to maintain the sovereignty of the States and to work with them as full partners in the administration of the three subjects proposed for accession."³⁵

It is not possible here to trace the course of the negotiations which followed; according to the frequent pattern of such controversies, calm and reasonable consideration deteriorated rapidly. To India it appeared that Hyderabad sought too much freedom which, if conceded, would leave a sore in the heart of India; to Hyderabad it appeared that India, in the face of earlier promises, now wished to absorb her completely—a Muslim State to be put under Hindu and alien rule after seven centuries of separate personality and growth. Each side charged the other with breaches of the Agreement, and words and tones which had once been cordial now became truculent on the side strong enough to afford truculence, and fearful and desperate on the weaker side.

In Hyderabad an organization known as the *Razakhars* developed.³⁶ The word means "volunteers," and they were at first merely helpers with the political party called *Ittehad-ul-Muslimeen*, whose purpose was to uphold Muslim strength. They grew rapidly as danger of attack from India grew, their intent being to defend Hyderabad and Muslims against border raids and invasion. Demonstrations were held opposing concessions to India, and the Ministry headed by Chattraji resigned. Furious accusations were made against them; they were called gangsters, who had frightened the Nizam into refusing to cooperate and had forced him to discharge his Prime Minister. Later, Sir Ramaswami Mudaliar told the Security Council that the Nizam had become "not a free agent, but a person under the control of a set of gangsters," and therefore India was forced to interfere.³⁷

³⁴ *Ibid.*, pp. 31, 112. The "Stand Still Agreement" may be found in *ibid.*, pp. 40-41; or in Government of India, White Paper on Hyderabad, 1948, Appendix II, p. 45.

³⁵ Complaint of Hyderabad, Appendices, p. 41.

³⁶ The view of the Government of India as to the *Razakhars* may be found in the White Paper on Hyderabad, Ch. VII, entitled "Razakhars: A Menace to Security."

³⁷ S.C., O.R., 3rd Year, No. 112, 360th meeting, p. 24. Modern propaganda describes those who defend their government against attack as "war criminals" or "gangsters." The effect of the *Razakhars* was not to change, but to support the Nizam's ardent desire for independence. The Nizam appears to have been a weak character, and it is possible that without this backing he might have been more willing to make concessions to India. The London Times reported, at the time of the Indian invasion, that the

In India, likewise, the Governor General repeated the offensive action by the Indian Pandit Nehru was saying, "—war or accession"; and when we consider it necessary to Hyderabad State."³⁸ The Governor General did not tolerate an independent Hyderabad State. He stated to delegates of Hyderabad that India was under great difficulties and there was no way to prevent the partition of India. In all of this, the implication was that Hyderabad was a separate unit, not yet part of India.

Economic Blockade

Among the complaints of Hyderabad against India upon it by India, which India at times denied that it had admitted it. By the terms of the Poona Pact of 1948, assured the Nizam: "on your State. . . . Never will India, be a party to any such arrangement," he said: "we will continue our relations with you to some extent and the tight relations will be maintained by the Governor General as part of a general policy, among other things, "The arrangements for the position of Hyderabad will be recommenced immediately.

Hyderabad complained of the loss of her holdings in India of land, currency and facilities for air transport.³⁹ The measures taken by India excluding medical supplies

fanaticism, military equipment, and other things "have been greatly exaggerated. Hyderabad had old guns, the rest being arms and ammunition."

³⁸ Complaint of Hyderabad, A. R. 1948, p. 14.

³⁹ In the House of Commons, Mr. A. V. Alexander, Secretary of State for India, said of "the extraordinary threat by India to the independence of Hyderabad," Official Report, 454 H.C. Deb. 51.

⁴⁰ Complaint of Hyderabad, p. 14.

⁴¹ *Ibid.* (Appendices), pp. 14-15.

⁴² Complaint of Hyderabad, p. 14, and Mr. A. V. Alexander, House of Commons, Official Report, Vol. 454, c. 1.

11 Parliament by Mr. Churchill and others. The blockade,
10 in making residents of Hyderabad realize their dependence

result of this "economic blockade" was the stoppage of the
; and ammunition to Hyderabad, with a resulting curious
; gun-running." The Governor General had given assurance
ominion Government will be able to supply your legitimate
'; but the repeated requests of Hyderabad were not honest,
se, how would India measure the legitimate requirements
d, her adversary? Sir Benegal Rau, before the Security
sized that a British court had convicted a "gun-runner"
supplying Hyderabad by air with machine guns, anti-aircraft
munition. He regarded this as evidence of lawlessness and
Hyderabad, as a result of which India was forced to interfere
; to Hyderabad, it was the inability to get guns which caused
; and her effort was due to fear of invasion rather than to
r. In reply to the demands of India that the *Razakhars*

broken up, the Nizam replied that if the Hyderabad Army
tely equipped and supplied to deal with raiders and local
s, there would be no need for the *Razakhars* ⁴⁵ and they were
. In the attitude of India on this point, there seems
question that Hyderabad was so completely a part of India—ev
quest—that purchase of munitions for its own use was illeg

ite and Arbitration

Governor General on August 27, 1947, sent a telegram to the
h he said that the Government of India "would not con
n other than your signing the Instrument of Accession,"
had done, but would be willing to "test the will of the
; British officers to conduct a referendum on this issue in
was recently arranged in the N.W.F.P." The Nizam re
problems of the constitutional position of Hyderabad are
question of referendum does not arise." ⁴⁶ The matter does
; been pressed further at this time, but on May 25, 1948,
General, in conference with the Prime Minister of Hyder

plaint of Hyderabad, Appendices, pp. 41-42.

, O.R., 4th Year, No. 28, 425th meeting, pp. 2-3. Sir Zafrullah Khan
does a government try to get anti-aircraft guns?" "The attempt
raft guns is an eloquent commentary on what Hyderabad feared a
ng to provide for." *Ibid.*, pp. 25-26.

plaint of Hyderabad, Appendices, p. 105.

ite Paper on Hyderabad, p. 36; Hyderabad's Relations with the C
, Vol. III, p. 19.

V. P. Menon, representing India, suggested to both parties the possibility of holding a plebiscite. According to the minutes of that meeting "neither of them were keen on this idea," but they did discuss various ways of holding a plebiscite, included among them direction by outsiders to be named by the United Nations, or by the International Court of Justice.⁴⁷ On June 7 there was further discussion, where "it was pointed out that the Government of India might well, but for recent events in connection with Kashmir, have agreed to the selection of the United Nations Organization [as the controlling authority]. But this was improbable in present circumstances." On the following day,

When the Prime Minister of Hyderabad pointed out that Hyderabad was agreeable to a plebiscite being held to decide whether Hyderabad should be independent or should accede to the Indian Dominion, Mr. Menon said that Hyderabad should now accede in substance and leave it to be confirmed by the plebiscite.

Mr. Menon further said that his government was not prepared to look at any draft "unless they were given—'here and now'—overriding powers of legislation in matters of defence, external affairs and communications and unless responsible government was granted in substance reflecting the position of the majority community." The Hyderabad delegation, having no such authority, withdrew and consulted the Nizam who, on June 15, issued a *Firman* agreeing to a plebiscite on the basis of adult franchise, under the supervision of some impartial and independent body, and agreeing also to establish a responsible government.⁴⁸

The *White Paper on Hyderabad*, issued by the Indian Government, heads a paragraph on these discussions "Nizam rejects the proposal," which is difficult to understand until one reads the words following: "on the issue of accession and interim arrangements." These "arrangements" could refer only to the Indian suggestion, noted above, that Hyderabad "accede in substance and leave it to be confirmed by the plebiscite." Such a plebiscite would appear to be a vain waste of money and energy. The "Complaint" presented by Hyderabad to the Security Council renewed the offer to hold a plebiscite "provided that negotiations, free of dictation, are resumed and that the conditions of freedom from outside interference and coercion are restored." It was again renewed before the Security Council by Nawab Moin, who added, "but there must be a true plebiscite, not a mockery under the pressure of Indian military power and of imported Indian administrators."⁴⁹

Attempts to arrange arbitration also failed. On April 5, 1948, when negotiations were becoming more difficult, the Prime Minister of Hyderabad

⁴⁷ Complaint of Hyderabad, Appendices, p. 111.

⁴⁸ *Ibid.*, pp. 129, 131, 139, 143-144.

⁴⁹ Complaint of Hyderabad, p. 17; S.C., O.R., 3rd Year, No. 112, 360th meeting, p. 18.

drew attention to Article 4 of the "Stand Still Agreement" as a proper course through which to resolve difficulties. To this the Government of India replied:

The Government of H.E.H. have suggested that the points in dispute should be referred to arbitration, and it is no doubt true that the Stand Still Agreement provides for such reference. But, considering the large number of points on which differences have already emerged, it is clear that arbitration on these points would take up all that remains of the period of one year for which the Agreement is to run, leaving little scope for the implementation of the award of the arbitrator. Reference to arbitration, moreover, could be regarded as a practical solution only if the Hyderabad Government were agreeable to taking certain steps immediately which could be regarded as a genuine token of that Government's desire to maintain cordial and friendly relations with the Government of India.

The only steps named at that time were disbanding of the *Razakhars* and cessation of propaganda. Hyderabad was unable to agree "that the Government of India can make that recourse conditional on Hyderabad's agreeing to any steps desired by the Government of India."⁵⁰ On July 18, however, the Nizam again asked for arbitration free from the conditions set by India.

By this time, it is clear from the story as it unfolds, India was pressing for complete surrender by Hyderabad and would only accept plebiscite or arbitration as a formality after that surrender had been made. Hyderabad, for her part, was retreating from her first position, which was close to assertion of independence, and making one concession after another, even to establishing responsible government, as to which the Nizam had at one time asserted that this was entirely an internal matter. Now she began to think in terms of outside help, and on August 21, 1948, appealed to the Security Council, asserting that she had done her utmost to obtain a settlement of the dispute "by the means contemplated in Article 33 of the Charter." In addition, Hyderabad informed the Secretary General of the United Nations of its intention to effect adherence to the Statute of the International Court of Justice in conformity with Article 93 (2) of the Charter and of its desire to sign, in due course, the Optional Clause of Article 36 of the Statute in order to facilitate settlement of the dispute with India.⁵¹

IV. THE JURISDICTION OF THE SECURITY COUNCIL

The cablegram from Hyderabad to the President of the Security Council was dated August 21, 1948, and spoke of a "grave dispute" for which consideration was asked under Article 35 (2). When the case came before

⁵⁰ Complaint of Hyderabad, Appendices, pp. 100, 104-105; see also pp. 143-144.

⁵¹ Complaint of Hyderabad, p. 16.

the Security Council on September 16, Indian forces had invaded and overwhelmed Hyderabad; and in the oral presentation made by Nawab Moin Nawaz Jung, appeal was also made under Chapter VII, and especially under Articles 39 and 40. India, as has been seen above, challenged the right of Hyderabad to appear and be heard.

Adoption of the Provisional Agenda

The question of aggression was, of course, never reached by the Security Council; technically, the only question taken up was the adoption of the agenda, although, as usual, the merits of the disputes were brought into the discussion.⁵² The Council has never yet decided what is meant by the word "agenda." The delegate of France (Parodi) observed that the Council was confronted "with a difficulty which we have previously encountered: to know the exact meaning of adopting an item on the agenda." On the one hand, he said, it could be maintained that "in order that an item of the agenda may be adopted, the Security Council must have determined its competency to deal with the question." On the other hand, he said, "it might be thought that in order to discuss its competency in the matter, the Council must first of all have decided to place the item on the agenda." He preferred the latter view, reserving all subsequent decisions of the Council, "including the possibility of its declaring itself incompetent in the matter." The delegate of the United States (Jessup) agreed, saying that "the appropriate way to investigate and discuss even the question of competence is to put the issue on the agenda so that the representatives may know what they are discussing." The President put to a vote whether the provisional agenda should be adopted, making it clear that adoption of the agenda "does not decide or affect in any way the question of the Security Council's competence." The agenda was adopted by a vote of 8 in favor and 3 abstentions.⁵³

In due course, then, the next discussion should have been as to the right of Hyderabad to be heard, and the delegate of India (Mudaliar) promised

⁵² The President, at the 425th meeting, dryly remarked: "I observe that, in accordance with custom, the representative of India, in dealing with the question of jurisdiction, has spoken at some length on the substance of the matter." S.C., O.R., 4th Year, No. 28, 425th meeting, p. 8. Similarly, at the 360th meeting, the President informed the representative of Hyderabad that the subject before the Council was not the "whole substance of the question" but the validity of his credentials. Nawab Moin insisted that the validity of his credentials could not be separated from a review of the situation and was allowed to speak.

⁵³ S.C., O.R., 3rd Year, No. 109, 357th meeting, pp. 8-11. It is difficult to see how the Council could decide its own competency, or decide whether it might wish to discuss an item unless that item had been put upon the agenda so that sufficient information and discussion would be possible to reach a decision. This seemed to be the prevailing viewpoint; and, though the Council has never ruled upon the point, it has always proceeded to discussion of an item and frequently as to its substantive merits, without ever deciding upon the preliminary point as to whether the item was properly upon its agenda.

to present arguments as to this point on the following Monday. Affairs did not, however, follow a due course; and at the next meeting the Council was faced with press reports as to the invasion of Hyderabad by India. This was confirmed by the representative of India, who also offered a telegram from the Indian Agent General in Hyderabad, purporting to communicate from the Nizam to Nawab Moin Nawaz Jung, President of the Hyderabad Delegation, instructions to withdraw the case from before the Council. The delegate of the United States (Jessup) viewed with deep regret the resort to force and asserted that: "The use of force does not alter legal rights. I believe that we would all be unanimous on this point."⁵⁴

The President proposed adjournment for a few days until more definite information could be obtained. Before a vote was taken, the delegate of Argentina (Arce) spoke:

I shall make no attempt to conceal my surprise at these events, and, if I may say so, at the attitude of the Council. Only two or three days ago, the Indian representative promised us all the necessary information to enable us to decide upon the competence of the Council. . . . He has furnished none of the arguments he promised; he has not proved that the Council is not competent to deal with the matter, and he has not examined the merits of the case.

He spoke with sarcasm as to the statement of the representative of India to the effect that the Nizam was coöperating with the Indian forces: "I do not find it difficult to accept this statement. In fact, I am sure it is perfectly true, for it is rather hard to refuse cooperation when it is demanded with a loaded pistol and a foot on your neck." He suggested that it would be difficult to reconcile the attitude of India toward the Indian minority in South Africa, under the domestic questions clause, with its attitude toward Hyderabad, and expressed himself as seriously disturbed by this attitude of a larger state toward a smaller one.⁵⁵

The representative of Colombia (Umaña Bernal) wondered what attitude the Council would adopt in the future should the State of Hyderabad disappear completely, and wished to keep the matter on the agenda. The delegate of Canada thought that "the situation in Hyderabad has improved" and expressed himself as "reassured" by the statement made by the representative of India. He thought it unnecessary to pursue the question of competence further, since no one would question the right of the Security Council to continue any discussion which it has commenced concerning issues that threaten peace. He, too, thought the matter should remain on the agenda. The representative of Syria (Azam) also felt that

⁵⁴ S.C., O.R., 3rd Year, No. 111, 359th meeting, p. 4. The United States has not followed up this fundamentally correct statement at any time since, nor has any other nation.

⁵⁵ S.C., O.R., 3rd Year, No. 111, 359th meeting, pp. 7-9.

the Council should keep the question of Hyderabad on its agenda; and the President confirmed this understanding upon adjourning the meeting.⁵⁶

At the next meeting, the President called attention to a communication signed by the Nizam of Hyderabad, addressed to the Secretary General (U.N. Doc. S/1011), withdrawing the authority of the Delegation of Hyderabad, and properly observed that this raised a question as to the validity of the credentials of the representatives present.⁵⁷ Meanwhile, the representative of Hyderabad had also sent a communication (U.N. Doc. S/1015) to the Security Council, in which he asserted that the military occupation of his country was not merely to restore order, but that India was taking over the entire administration and "had compelled the Nizam to surrender complete power to the Indian military commander." He therefore suggested, especially in view of the censorship imposed by India, that the Council appoint its own observers. The delegate of Syria (El-Khoury) raised a question as to the authenticity of the message from the Nizam, and took up the suggestion that the Council should conduct its own investigation. The delegate of Argentina (Arce) could "see no reason for burying our heads in the sand"; India had admitted her guilt and so no proof was necessary. He was unwilling to give credence to any communication bearing the signature of the Nizam unless the Nizam appeared personally to authenticate it. "It appears entirely clear to me," he continued, "that the Security Council must request the Government of India to withdraw its troops from Hyderabad and re-establish the former Government there." The President thought that it was not so much the authenticity of the notification from the Nizam which was being questioned, but rather "whether it was written under some kind of compulsion." He suggested that both parties be heard as to the validity of the credentials of the representative of Hyderabad. This proposal was accepted, though, observed the delegate of Colombia, such a discussion would not shed much light; what was needed was an investigation by the Security Council itself.⁵⁸

Having been invited to the table, Nawab Moin reasserted that the conduct of India in Hyderabad was not that of one seeking merely to restore order, but was rather the conduct of a military conqueror; and that the Nizam was completely under the control of the Indian military commander.⁵⁹ The delegate of India (Mudaliar) suggested, though he did not explain, that the Nizam was not a free agent at the time he appointed the delegation of which Nawab Moin was head; and he quoted a broadcast made by the Nizam on September 23 (several days after the conquest) in which the Nizam disavowed his delegation at Paris and asserted that he was acting

⁵⁶ *Ibid.*, pp. 9-11. On a previous occasion, in the second Iranian case, the Council had asserted its right to maintain a question upon its agenda even though the complaining party had asked that it be withdrawn.

⁵⁷ S.C., O.R., 3rd Year, No. 112, 860th meeting, pp. 3-4.

⁵⁸ *Ibid.*, pp. 5-13.

⁵⁹ *Ibid.*, pp. 13-20.

of his own free will. Sir Ramaswami repeated the charge of gangsterism and asseverated that India was "pledged to the method of ascertaining the wishes of a people through adult franchise." He wondered if it "would not be the wisest thing for the Security Council to let the matter drop and to allow peace to prevail in my country, including Hyderabad." ⁶⁰

At the conclusion of these talks, the President passed on to another matter, leaving the Hyderabad question in the air, where it would doubtless have remained but for the later intervention of Pakistan. The provisional agenda for the 382nd meeting (November 25, 1948) put first the item of Hyderabad but, for sufficient reason, the Council took up another item first. At the conclusion of the substituted item, the President (Arce) suggested adjournment. The delegate of Syria (El Khouri) inquired as to the Hyderabad item and was told that Pakistan had in October (U.N. Doc. S/1027) and again on November 20 (U.N. Doc. S/1084) asked to be heard; it was for this reason, said the President, that the Secretariat and he had put it on the agenda. He observed that he had received from the Head of the Permanent Delegation of India a letter, dated November 24, reiterating that India had no representative present to discuss the matter "because it had understood that this question would not be considered at any time or for whatever new motive." ⁶¹ There is nothing in the records to show that such an understanding had been reached. In the absence of a person to speak for India, the delegate of Colombia proposed that the matter be postponed and, though Syria objected that the Council did not need India present in order to decide whether Pakistan should be heard, it was decided to adjourn. The President meanwhile corrected the French interpretation of the letter from Madame Pandit; he explained that what she had wished to say was "that there is no representative of the Government of India in Paris at present who is authorized to discuss this question." ⁶²

The provisional agenda of the next (383rd) meeting contained nothing as to Hyderabad, and the delegate of Syria interrupted discussion to inquire why this was so. He quoted Rule 10 of the Rules of Procedure:

Any item of the agenda of a meeting of the Security Council, consideration of which has not been completed at that meeting, shall, unless the Security Council otherwise decides, automatically be included in the agenda of the next meeting.

⁶⁰ *Ibid.*, pp. 20-28.

⁶¹ S.C., O.R., 3rd Year, No. 127, 382nd meeting, pp. 27-28, referring to Docs. S/1084 and S/1089. In the latter communication, dated Nov. 24, 1948, Sir Ramaswami Mudaliar had said: "There no longer exists any reason for the Government of India to maintain a delegation in Paris for dealing with the Hyderabad question" because the "complaint which Hyderabad had never any right to make now stands expressly withdrawn."

⁶² *Ibid.*, p. 29.

The Assistant Secretary General (Sobolev) replied that "the Indian delegation still has no qualified representative appointed to the Security Council to discuss these questions." The delegate of the United States (Jessup) asked whether any further information had been received from India and, on being told that "the Secretariat has still not received any notification from the Indian delegation that it has a duly qualified representative . . .," he expressed himself as satisfied that the reason for the exclusion of the item from the agenda was a valid one. The President considered the matter closed; but the delegate of Syria (El Khouri) again insisted that the failure of the Indian delegation to have adequate representation surely "does not mean that all meetings should be postponed for that reason."⁶³ The procedure here attempted by India would, if accepted by a complaisant President, be a very simple way in which a state could avoid discussion and block the jurisdiction of the Security Council over a case in which it was a party.⁶⁴

At the next meeting, Hyderabad was on the agenda, and the President (van Langenhoven) summarized the situation. On December 6 Pakistan had written (U.N. Doc. S/1109) suggesting that in the fortnight which had elapsed, India had had time to bring a representative, and asking that the Hyderabad matter be brought to the Council before Christmas. Still another communication (U.N. Doc. S/1115) had been received from India; it was dated December 10, from the Indian Ministry of Foreign Affairs, and it "announced that his Government did not intend to send a representative to the Security Council to discuss the matter." The President referred also to a letter from Mr. Moin Nawaz Jung (U.N. Doc. S/1118) received December 14, in which he said that "he had no intention of asking that the Hyderabad delegation should be represented at any future meeting which the Council might wish to devote to the matter."⁶⁵ This was an error (corrected by Nawab Moin in Doc S/1380); the letter read as follows: "I do not propose to ask for the Delegation to be represented at the next meeting of the Council." (Doc. S/1031.)

Having explained the situation, the President inquired whether there was any objection to inviting Sir Zafrullah Khan to the Council table, and heard none. As soon as Sir Zafrullah was seated, however, the President proposed that he postpone his statement until the Security Council

⁶³ S.O., O.R., 3rd Year, No. 128, 883rd meeting, pp. 2-5, 6-7. To be fair, it should be said that Rule 10 is not always observed, since it would have the effect of putting all unfinished business of the Council upon the agenda at each meeting.

⁶⁴ The Deputy Prime Minister of India, Sardar Patel, speaking to the Parliament March 17, 1949, said: "There are still people who believe that Hyderabad is still on the agenda of the Security Council. . . . But Hyderabad is a settled fact which no one can alter. It is a domestic affair and India is powerful enough to resist anybody." *Times of India*, March 18, 1949.

⁶⁵ S.C., O.R., 3rd Year, No. 129, 884th meeting, Dec. 15, 1948, pp. 39-40.

had returned to New York.⁶⁶ To this he agreed, having thus been put off again; and he had to request the Council again to hear him (U.N. Doc. S/1317). In May, 1949, at the 425th and 426th meetings, at a length somewhat exasperating to the Council, he dealt with the whole question, bringing it up to date with the fact that what had been alleged to be an intervention to maintain order had now become conquest and absorption. He showed that the Ministers and other leaders who had resisted the Indian attack had been imprisoned since the conquest, and were now being brought to trial and refused the right to obtain counsel;⁶⁷ that Hyderabad officials were being displaced by persons from outside Hyderabad; and that property was being confiscated. He charged that the situation was a new threat to the peace, because of the sympathy of the Pakistan Moslems for their brethren mistreated in Hyderabad.

When he had finished, not a member of the Security Council said a word; and not a word has been spoken in the Council since that time concerning Hyderabad. This, of course, meant defeat for Hyderabad, since neither it nor Pakistan could propose action. Those who were members of the Council could block by failing to speak.

The Status of Nawab Moin Nawaz Jung

One of the curious features of this case is the situation in which it left the Head of the Hyderabad Delegation. Nawab Moin came properly accredited by the Nizam of Hyderabad as his representative in the dispute with India, and in this capacity he was received and heard by the Security Council. Though the competence of Hyderabad to present the case was challenged, the credentials of its representative were not, until the conquest of Hyderabad had been achieved and a telegram had come, purporting to be from the Nizam, in which the Nizam said: "The delegation to the Security Council which had been sent at the instance of the said Ministry has now ceased to have any authority to represent me or my State." (U.N. Doc. S/1011.) Such a communication would have, in ordinary circumstances, peremptorily ended the participation of the Hyderabad delegates; but, in the circumstances of this case, acceptance of the Nizam's message would have meant acceptance by the Council of the fact of conquest by India and also would have assumed that the Nizam was not acting under duress. These assumptions, as we have seen, the Security Council was unwilling to make, and the matter was kept upon the agenda. This action—retention of the matter on the agenda—can be construed in no other way than to mean that the Security Council is not satisfied as to the legality of the action taken by India. If it were satisfied, and willing to accept as legitimate the conquest and absorption by India, it would have to accept the message withdrawing the credentials of the Hyderabad Delegation,

⁶⁶ *Ibid.*, pp. 40-42.

⁶⁷ See, as to this, U.N. Doc. S/1380.

whether written by the Nizam or not; but until it does decide the question one way or the other, the validity of the credentials given to the Hyderabad Delegation must be respected.

This logic was accepted in practice by the Secretary General and by the President of the Security Council. When Nawab Moin came to the meetings in New York, he was accredited by the Secretariat to the Department of State of the United States as the representative of a party to a dispute before the Security Council; and when he submitted a communication to the President of the Security Council concerning the mistreatment of Hyderabad by the Indian Military Government, it was published as an official document (U.N. Doc. S/1380, August 25, 1949). In this document he reasserted what he had previously said (U.N. Doc. S/1118), "the authority of our delegation as originally appointed and its continued right and obligation to defend the interests of Hyderabad before the United Nations." This position has not been denied; he apparently remains accepted as the representative of Hyderabad.

At the end of November, 1949, a further step in the absorption of Hyderabad into India was taken. The Military Governor was replaced by a civilian administrator whom the Nizam submissively designated as his "Chief Minister." This was regarded as a "caretaker government" until popular elections are held next year. These elections would be held in connection with the promulgation, also announced, of a new constitution for the Union of India, under which Hyderabad would be incorporated into the Union. The Nizam, submissive here also, issued a *Firman* declaring that the new constitution would be accepted by Hyderabad, subject to ratification by the people who "must finally determine the nature of the relationship between this State and the Union of India," through the constituent assembly to be chosen later.⁶⁸

The latest—and under the circumstances possibly the last—action of Nawab Moin Nawaz Jung as representative of Hyderabad was to address a letter, dated December 20, 1949, to the President of the Security Council. In this letter he urgently called to the attention of the Council the imminent absorption of Hyderabad into India, and asked that it act before it was too late. He called attention to the formation of a government-in-exile in Karachi, which would give him more support. He also suggested that, if the Council was not willing to take action against the aggression itself, it could at least call upon India to give amnesty to the leaders of Hyderabad, who have been imprisoned all this time, to return the private property which she had confiscated, and to restore the rights of Hyderabad officials who had been displaced or otherwise victimized. Thus, he offered a basis of settlement which would have given to India all that she wanted and which offered an easy way out for the Security Council.

⁶⁸ Times of India, Nov. 25, 1949.

Nevertheless, the President of the Security Council (McNaughton) refused to authorize the publication of this letter as a United Nations document, though all previous communications had been so published; and when Nawab Moin protested against this, the succeeding President (Tsiang) denied the protest. There is no doubt as to the discretionary power of the President of the Security Council, together with the Secretary General, to make such a decision. In this case, the effect of the decision was to deny to a party to a dispute on the agenda of the Council a hearing on his urgent appeal.⁶⁹

CONCLUSION

Practically speaking, the case of Hyderabad is finished. Under the new Indian Constitution Hyderabad has been incorporated into the state of India, and the Nizam submissively participated in the ceremony by which it was done. The item remains upon the agenda of the Security Council, but there is no indication of interest in that body. States could refuse to recognize as legal this change brought about by the use of force contrary to treaty; the Security Council could still take action, though it would be difficult to undo a *fait accompli*. Possibly, a British court will be called upon to give the decision which the Security Council failed to render.⁷⁰

It is said that a custom is being developed whereby the Security Council keeps a matter indefinitely upon its agenda with no intention of acting again upon it, the purpose being to save face, and that this is the explanation in the case of Hyderabad. If so, the effect can only be to darken still more the reputation of the Security Council.

The failure of the Security Council in this case is the worse since it was not due, as in other cases, to uncertainty as to legal rights, or to the extrinsic difficulties of the problem. The legal rights were embarrassingly clear; and a satisfactory political settlement could have been agreed upon

⁶⁹ Mimeographed copies of the letter were distributed to Members by the representative of Hyderabad.

⁷⁰ When Nawab Moin Nawaz Jung found that Hyderabad was in danger of being conquered, he transferred a large sum of Hyderabad State money into a special fund in a British bank. This was done in his capacity as Finance Minister and, as a result of his foresight, India was unable to take over this money. According to newspaper reports, India has now instituted suit (in the name of the Government of Hyderabad) in a British court to obtain the money. The claim must be based upon the premise that conquest gives title, for title has been acquired in no other way. In such cases, the court relies heavily upon the advice of the foreign office, and it will be interesting to see what this advice will be. Previous precedents indicate that India cannot be regarded as the legal successor of the State of Hyderabad unless the British Government has given *de jure* recognition to the conquest. (See the case of Haile Selassie v. Cable and Wireless, Ltd., this JOURNAL, Vol. 33 (1939), p. 580; referred to in note 25, *supra*). In any case, a decision to turn the money over to India would give legal effect to a transfer of title accomplished by the use of force contrary to the Charter of the United Nations.

with little difficulty. In all other cases, the Council has tried, and has frequently achieved a solution; in this case it did not even try. There is not in the records of the United Nations a more complete failure, and the failure is entirely its own; it cannot be blamed upon the Soviet Union.

In the pages of history, the conquest of Hyderabad will doubtless receive no more than a line. It is practically unknown—though in area, population and financial strength it is larger than many Members of the United Nations; its legal status is uncertain in the minds of many; it is inevitable that it should become a part of India; no global war is apt to arise from the situation. It is understandable why the Security Council should be impatient with this question, but it is more difficult to understand why, with such an outlook, the Security Council took such vigorous action in other equally minor affairs. The Indonesians were even less known than the Hyderabadis; they were clearly under the jurisdiction of The Netherlands, whereas Hyderabad was not under the jurisdiction of India; the domestic questions clause could legitimately be argued to bar the jurisdiction of the Council in Indonesia, whereas it could not be so argued as to Hyderabad. A similar situation was that of the Indians in South Africa. In these cases, the Council, pressed hard by India, overrode sound legal arguments in order to support the claims of small or minority groups; but in the Hyderabad case, where the legal argument was in its favor and where the Charter called for action, the Council refused to act.⁷¹

What is involved here is a question of fundamental importance to the United Nations, a question upon which the American Society of International Law has appointed a committee to report to its next meeting.⁷² This question is whether the United Nations is to be a constitutional system or not. Thus far, its trend has been away from law; the Security Council (and the General Assembly as well) has overridden the restrictions set by the Charter where it has desired to take an action, and has disregarded both its obligations under, and the principles of, the Charter when it did not desire to take action. This problem is now beginning to be recognized and debated; it obviously cannot be discussed here. It is in this connection that the case of Hyderabad deserves study by those who are interested in achieving a system of international law and order in the world.

⁷¹ "The Hyderabad complaint remains on the agenda of the Security Council and India has been rewarded for her 'police action' with a seat on that body—a reward that the Dutch could not have expected in their wildest dreams for their repeated 'police actions' in Indonesia. Inscrutable indeed are the ways of Western democracy—and of its most boosted compeer, the Indian." Editorial from the newspaper, *Dawn*, Karachi, Nov. 12, 1949.

⁷² *Proceedings*, 1949, p. 134; for committee's conclusions, see this *JOURNAL*, Vol. 44 (1950), p. 154.

THE CLOSING OF THE MIXED COURTS OF EGYPT

BY JASPER Y. BRINTON

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The Mixed Courts of Egypt closed their doors on October 15th, 1949. At their inauguration in 1875, the Khedive Ismail had used these words: "This day, gentlemen, will mark the commencement of a new era of civilisation in the history of Egypt." This was a bold prophecy to make for an institution to whom the Powers had given only five years of life. The event, however, amply justified the Khedive's prediction, and proved once more the truth of the Egyptian proverb, "Only the provisional endures." The institution survived every test. Twenty times its life was successively renewed for periods varying from two to five years. The well-known words of Sir Maurice Amos, spoken in 1925, when the Courts were rounding the half-century mark, might still challenge contradiction a quarter of a century later, as they reached the end of their life: "I have often taken occasion to remark that next to the Church, the Mixed Courts are the most successful institution in history."

In a series of articles contributed from time to time to the pages of this JOURNAL, the writer has had the privilege of reviewing generally the history of this institution and of discussing some special phases of its work, including its impact with the military power.¹ It remains today to contribute a final chapter.

It may be recalled that by the Montreux Treaty of 1937, the Courts were to continue for a "transition period" of twelve years, after which they were to pass out of existence and their powers were to be absorbed into that of the purely national courts. One of the principal objects sought to be accomplished by this arrangement was the immediate abolition of the greater part of the jurisdiction of the Consular Courts—an institution whose extravagant extensions of power had been one of the principal rea-

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¹ "The Mixed Courts of Egypt," this JOURNAL, Vol. 20 (October, 1926), p. 670; "Suits Against Foreign States," *ibid.*, Vol. 25 (January, 1931), p. 50; "Egypt: The Transition Period," *ibid.*, Vol. 34 (April, 1940), p. 208; "Jurisdiction Over Members of Allied Forces in Egypt," *ibid.*, Vol. 38 (July, 1944), p. 375; "The Egyptian Mixed Courts and Foreign Armed Forces," *ibid.*, Vol. 40 (October, 1946), p. 737.

sons for the creation of the Mixed Courts themselves. By the Treaty, the broad criminal jurisdiction exercised by the Consular Courts in the case of foreigners was therefore transferred to the Mixed Courts, as was also the jurisdiction which they still retained in civil matters affecting only their own subjects. An exception, however, was made in the important field of personal status, including domestic relations and decedents' estates. Here, the capitulatory Powers were granted the option of retaining their consular jurisdiction until the end of the transition period. Option to this effect was to be declared at the time of ratification, and fifteen states made the necessary declarations. This, however, did not cover the whole field. Portugal did not reserve its jurisdiction. As to other countries, the war intervened to restrict the operation of the option thus offered. In 1941 the jurisdiction in the case of Italians was transferred to the Mixed Courts and in 1942, a provisional transfer was made in the case of France—the provisional character of this interruption being explained by the fact that the suspension of diplomatic representation was only provisional.

As a step towards the eventual Egyptianization of the Mixed Courts in 1949, the Treaty provided that in the filling of vacancies during the transition period, the proportion of Egyptian judges in the lower courts should be increased until it reached two-thirds, instead of, as previously, one-third of the total membership of these courts. In the Court of Appeals, however, the proportion of two-thirds foreign judges remained unchanged. At the same time, the rule that the presidencies of the courts should be held by foreign judges was abolished in the case of the lower courts.

As in the case of World War I, the impact of the second world war brought no disturbance to the even tenor of judicial life beyond those physical disturbances—somewhat violent at times—which were felt equally by all classes of the population. The Italian and Austrian judges did not resume their seats, and were replaced by appointments from other Powers, with the result that the new maximum of two-thirds Egyptian judges in the lower courts was reached in the short period of four years. Nor did the existence of martial law present any particular problem. Its only tangible effect was to transfer to the military courts a large number of criminal offenses which would ordinarily have been brought before the Mixed Courts. This did not prevent the new criminal jurisdiction taken over by the Mixed Courts from assuming large importance, and the long series of opinions handed down during the twelve-year period will prove an important contribution in the field of Egyptian criminal law.

Among other measures taken during this period looking to the closing of the Mixed Courts, was the transformation in 1947 into a separate administration, purely Egyptian in character, of the Office of Registration of Deeds and Mortgages, a responsibility which had been assumed early in the history of the Mixed Courts as a necessary incident to the protection

of land titles, and had become of large importance, involving the opening of branch offices at many different towns in Egypt. As this service was not an integral part of the judicial institution, its establishment as a separate institution was a logical step in the preparation for the final liquidation of the Courts. Its transfer presented the advantage that it enabled the Government to profit by the active coöperation of the authorities of the Mixed Courts in getting the new system into working order. An analogous measure took place a year later in the transfer to the same department of the service of Notaries Public, which had also been, from the beginning, under the direction of the Mixed Courts.

Closing Ceremonies of Courts

The closing of the Courts was marked by a double series of events. The first of these took place in June, 1949, at the end of the last regular term sessions of the Court of Appeals and immediately prior to judicial vacations which, for most of the judges, meant a final departure from Egypt.

The principal event was a banquet of two hundred covers, given by the Egyptian Government in Alexandria, attended by the members of the Egyptian Cabinet and a large representation of the Egyptian judiciary. This occasion, as all the other official events connected with the closing of the Courts, was distinguished by the spirit of good will shown toward the Courts and by a generous appreciation of their services to the country. It may be of interest to quote briefly from the remarks of the Minister of Justice, speaking for his Government:

We are met, gentlemen, to say farewell to our distinguished colleagues who have served in the ranks of the Mixed Courts for many years past, consecrating their best efforts, their science, and their high abilities to the solution of litigation between Egyptians and foreigners. This was a task as difficult as it was delicate, but it was a task close to the hearts of those servants of the people whom Providence had summoned to administer justice between men. Gentlemen, Egypt appreciates at its full value the work accomplished by each of you. She will never underestimate those efforts. She will never forget the sacrifice which you have made of your lives, your health, and your hours of rest in the accomplishment of the duty confided to you and for which you left your country and your relatives to come to this Egypt which has received you with open arms—I venture to hope that this welcome has made easier for you the separation from your home and that when you return once more to your countries, you will feel that there exists another tie here in Egypt—which for a time has been your second fatherland. Colleagues and friends, may God long preserve your health and strength, and restore you in safety to your fatherlands.

In closing his address, the Minister of Justice announced the bestowal by His Majesty on the retiring judges of high decorations in the Order of the Nile.

The second series of ceremonies incident to the closing of the Courts took place in October, 1949. During the last week of their official existence, regular hearings had been held by several of the lower courts, at which formal notice was taken of the finality of the occasion and addresses appropriate to the day were made by the members of the judicial family and the official representatives of the Bar. In the Cairo Court, the President Judge, an Egyptian, made the following felicitous reference to the mingling of cultures and legal philosophies in the composition of the Mixed Courts judiciary:

Here may be seen the clarity of thought of the Latin people and their feeling for the spirit of the law; the rational positivism of the Anglo-Saxons, with their devotion to common sense, equity and individual liberty; the dynamic spirit of German culture; the calm, analytical attitude of the Scandinavians with their devotion to discipline; the intellectual sensitiveness of Greeks, particularly open to influences of both East and West; and finally that liveliness of the Egyptian spirit and the solid basis of their legal conception, without which the magnificent monument formed by the jurisprudence of the Mixed Courts would not have been erected.

Another impressive ceremony connected with the closing of the Courts was the extraordinary General Assembly of the Mixed Court Bar, under the presidency of its Bâtonnier, Maître Jules Catzeffis. The address delivered by this gentleman—a moving tribute to the services rendered by successive generations of lawyers in the building of the Mixed Courts and in the welding into one coherent and harmonious system of the many elements of which it was composed—ended on a note of courage and determination:

We leave behind us, my colleagues, a work which has been well done. But this work we shall continue. In joining the National Bar, which follows the same rules and the same traditions as ourselves, which is the expression of the same judicial culture and which receives us as members of the same family, our role continues, and we shall remain faithful to our task which is, above all, one of service and defense. This is why we must not let a spirit of sadness dominate this our last assembly. Our meeting must adjourn in a spirit of high hopes. Let us say, rather, that nothing is finished; that our profession continues; and let us fix our next meeting here in this Court House before the National Court of Appeals three days hence. Thither you will repair in the robes of your profession to plead your cases, for justice is eternal, and you shall be its defenders until the end, in this Egypt which numbers its years by thousands and which has given shelter to us all.

One more ceremony remains to be recorded. On October 15, 1949, the Egyptian Minister of Justice, in the presence of a distinguished assembly gathered in the Cairo Opera House, handed to His Royal Highness, Prince Mohamed Aly, representing King Farouk, the seals of the Mixed Courts of Egypt. The new era had begun.

Closing of Consular Courts

Contemporaneously with the closing of the Mixed Courts, the Consular Courts also closed their doors.

The jurisdiction of these courts in Egypt is of ancient lineage. The first British Consul was appointed on April 25, 1553, and was given judicial powers over disputes between English subjects, as well as the matter of estates. The formal exercise of American consular jurisdiction is comparatively recent. While the rights reserved under the Treaty of 1830 with Turkey undoubtedly included the exercise of consular jurisdiction, formal statutory authority for its exercise in Egypt was set up by the Act of Congress of 1860 as later extended. It was this jurisdiction which was partially suspended in favor of the Mixed Courts in 1876.

The closing of these courts was also marked by appropriate ceremonies. The British Consular Court convened for the last time at the British Consulate General in Alexandria. The British Ambassador to Egypt was present, as were also the members of the Consular Bar, in wigs and gowns. An address was made by the President of the Court, followed by the Crown Advocate. The Ambassador closed the ceremonies by a tribute to the Court as an edifying example of British justice. On the same day similar proceedings were held in the Greek and French Consular Courts.

Preparations for New Régime

It goes without saying that the added burden which has been imposed on the Egyptian national courts is heavy, but it is a burden long anticipated, and it falls upon strong shoulders. Encouraged, no doubt by the example of independence furnished by the Mixed Courts, the Egyptian Government, as one of many steps in its preparation for the new régime, promulgated in 1943 an elaborate law on the Independence of the Magistracy. This law provided important safeguards to judicial tenure and created a Judicial Council, composed of judges, with large disciplinary powers. Its promulgation was made the occasion of a dignified ceremony attended by the Egyptian Bench and Bar. As an indication of the seriousness of the Government's endeavors to strengthen the judiciary, it may be of interest to record the following passages from the address of the Egyptian Prime Minister, Nahas Pasha, who, following the recent elections, has again assumed the reins of government:

In fulfillment of our duty to you and to Egypt we have satisfied our conscience and have realized one of the dearest aspirations of our country. We have placed in your hands, for the present and for the future, the full responsibility for the administration of justice. We have surrounded you with guarantees which leave to your conscience alone the sovereign duty of rendering justice. Let it always be remembered that conscience is to be your only guide; that you have to fear God alone, and that your independence and your search for truth are ramparts that must stand against injustice. Remember

always the wise warning of the Koran which reminds us that the earthly judge—if he be not just—shall tremble before the heavenly judge. Remember always, that to incline in favor of one or other of the adversaries who appear before you, even if it be only in thought, will be an act of wickedness, and that to favor one above the other in a court will bring your name into disrepute. Keep yourselves free from such acts; avoid all such suspicions; take care to let no spirit of politics or party enter into the administration of justice—for these are swords with double edges which fall at once on the oppressor and the oppressed. Unhappy the nation whose judges yield to their passions! Happy the judge who in his judgments rises above all suspicions, who is free from passions, and who allows himself to be guided by right and justice alone and thinks but to obey his conscience! Happy the judge who has not compromised his eternity with what he has done here below. He shall be among the most respected of men and be held in esteem before All Powerful God.

It may be added that a comprehensive reorganization of the Egyptian national courts has recently been effected.

The most striking change involved in the transfer of jurisdiction is that of language. Arabic is, of course, the language of the Egyptian courts. In the Mixed Courts, while four official languages existed, French was the language of universal use. The translation into Arabic of the great body of documents which go to make up the several thousand cases carried over from the Mixed Courts, is not a feasible task, but fortunately the majority of the forty Egyptian judges who were on the benches of the Mixed Courts have accepted transfer to the national courts. Many others of their colleagues have also a working knowledge of the French and English languages. The presence of these judges will be an invaluable asset to the courts in the liquidation of the cases which have been transferred.

In carrying out their added responsibilities, Egyptian judges, many of whom are today heavily overworked, will find strong support in an excellent Bar, which has been strengthened by the addition to its rolls of many of the ablest members of the Bar of the Mixed Courts, the right to a transfer having been included in the provisions of the Montreux Treaty. While few of the members of the old Mixed Courts Bar have sufficient command of Arabic to plead before the national courts, many of them have already entered into association with Egyptian colleagues.

The experience of the few months which have passed since the new régime went into effect has been most encouraging. The courthouses formerly occupied by the Mixed Courts, including the magnificent Palais de Justice of the lower courts in Cairo, completed in 1934 at a cost of several million dollars, were turned over to the national courts, with their records remaining undisturbed, in charge, for the most part, of Egyptian employees long familiar with the system. As in the case of the judges, collaboration

between old employees and those newly appointed has been marked by signal cordiality and the order of the day has been to "carry on" with the minimum of change.

Law Reforms

In the field of law, the problem has been dominated by the fact that, as was observed by the Bâtonnier, the two institutions, Mixed and national, have always administered substantially the same legal system—based on the French codes. Occasion has been taken, however, to make a number of changes in the fields both of substantive law and of procedure.

The most important change has been the promulgation of a new Civil Code on which work had been begun in 1936. A code of 1149 articles replaces the earlier codes of the Mixed Courts and the national courts which comprised 774 and 641 articles respectively.

These codes were closely modeled on the French codes of seventy years earlier, and while they had been frequently amended, it was obvious that they presented many *lacunae*, and were in other ways inadequate. The new code is more than a revision. It is highly eclectic and represents a carefully planned effort to embody the best elements in modern European legislation, having regard also to the principles of Moslem law. Most of the European systems have been laid under contribution. Practicing lawyers have criticized the work on the ground that it introduces into Egyptian law many new concepts and may impair somewhat the value of that large body of carefully recorded jurisprudence which has been one of the great contributions of the Mixed Courts to the Egyptian judicial world. Against this objection, however, must be set the fact that the code, for all the affection which long familiarity with its articles had aroused in the Bench and Bar, was, in many ways, an inadequate guide amid a maze of new and expanding legal problems. It remains yet to be seen how far the new code will realize the ambitions of its framers.

A new Code of Procedure, which has been many more years in preparation than the new Civil Code, has also been promulgated. It is of interest as emphasizing the importance of the rôle of the preparatory judge, thus encouraging a personal contact with litigants and a preliminary clearing up of the issues, for which the procedure in the Mixed Courts offered very inadequate opportunities. It also greatly simplifies the previous tedious and expensive procedure covering the execution of judgments.

Work on a new Commercial Code, a task presenting very special difficulties, has been long in progress, but has not yet been completed. A revision of the Maritime Code has, however, been prepared by a commission of which the writer is the chairman, and it is hoped that it will be shortly submitted to Parliament for legislative action.

Personal Status

The situation as concerns matters of personal status, including divorce and decedents' estates, is, of course, of particular interest to foreigners in Egypt. The controlling factor is the formally declared intention of the Government to apply, in all these matters, the principle of the national law of the parties. This principle had already been made applicable in the Mixed Courts by the Montreux Treaty, within the limited area already explained. To provide for the exercise of this jurisdiction, the Egyptian Government had promulgated, five months after the signing of the Montreux Treaty, a code of procedure to be applied in the Mixed Courts. It was perhaps but natural that this code should have been based on French procedure. As such it served well when called into application by the litigation involving French and Italian interests. No particular necessity was felt for taking into account the difference existing between the French and Anglo-Saxon procedure in matters of family law, and it was not until the Government was faced with the necessity of preparing a comprehensive code of procedure in this field which should meet the broader requirements of the national courts after 1949, that the difficulty was fully appreciated. The work of solving this problem was confided to a committee of competent Egyptian jurists, and was attacked on a strictly scientific basis. The committee enlisted the collaboration of the legal representatives of both the British and American Embassies with a view to setting up a procedure which, without favoring any particular system, would be sufficiently elastic to take account of the various incidents of the Anglo-Saxon procedure. It is expected that this new code of procedure will shortly be promulgated; meanwhile the code of 1937, which has been temporarily continued in effect, is being applied in a liberal spirit to new situations as they arise.

In the matter of substantive law in the field of personal status, the new Civil Code contains explicit directions as to the applicability of national law to particular situations. One of these is of special interest in the case of American nationals. The code provides that whenever reference is to be had to the law of a state in which there exist several judicial systems, "the system to be applied shall be determined by the internal law of such State." (Art. 26.) Here, as elsewhere, the courts, in their endeavor to ascertain the law to be applied, will doubtless avail themselves of the services of diplomatic authorities of the countries involved, as well as of such sources of information as are offered by counsel.

In other branches of the law, also, legislative progress has been made. During many years, in the absence of statutory provision in the field of trade-marks, unfair competition, and patents, the courts had recourse to the direction of the code that in a case of silence or insufficiency in the written law, the judge should have resort to natural law and equity. This

system was so satisfactory that Lord Cromer, an eminently practical man, had remarked with reference to a proposed trade-mark law that the object had already been so well obtained by decided cases, that it was best to leave the situation as it was. It was not until many years later, in 1939, that a law on trade-marks was passed, and a special bureau established. This was followed in August, 1949, by an elaborate law on patents.

It may be remarked that the new Civil Code contains a provision closely similar to that noted above and providing that in the absence of an applicable legislative text, the judge should have resort to custom, and in its absence, to the principles of Moslem law. If, in turn, these should not offer a solution, resort is then to be had to natural law and the rules of equity.

Historical Reflections

In surveying the long and splendid history of the Mixed Courts, one is naturally tempted to speculate on what-might-have-beens. If, throughout three-quarters of a century, the institution responded so admirably to the special needs created by the presence of enormous foreign interests in Egypt—the most cosmopolitan legal forum in the world—why did it not lead to some permanent incorporation into the judicial system of the country of the principle of the foreign expert, which, as Nubar Pasha himself, the principal artisan of the Mixed Courts, constantly insisted, was the basis of the new institution?

The speculation is not idle. It points to a fundamental weakness in the institution which has not been unnoticed by the able men who were later concerned with the problem. This weakness consisted in the existence of two separate and independent systems of justice, one of them largely international in character, administering side by side, but essentially without contact with each other, the same law, but in different languages.

At the outset Nubar Pasha had boldly proposed the establishment of an institution which should have jurisdiction over all the inhabitants of the country. His plan was ahead of its time, and was solidly opposed by the European Powers. Many years later, Lord Cromer, a man of great vision, who had always been opposed to the extension of the international principle in Egypt, sought to bring about a reorganization of justice along the lines proposed by Nubar. This proposal, too, was unsuccessful, and the Courts continued in the full possession of their independence for another generation until the fatal anomaly of the existence in a sovereign state of a semi-international judicial institution brought about its abolition.

It seems clear, however, that, whatever might have been its temporary advantages, the realization of any such measure of unification as had been contemplated by Nubar Pasha and by Lord Cromer, would have been bought at a heavy price. The strength of the Mixed Courts lay precisely

in that completeness of independence which had enabled them, during a critical period in the history of modern Egypt, to attract to their benches, there to collaborate with the best of Egyptian jurists, the ablest legal talent available in foreign lands, and to develop a Bar which was second to none in Europe.

Both on the Bench and at the Bar, figures whose names have become legendary in the history of the Courts, established traditions which were guarded to the end by a closely organized and intensely loyal judicial family, proud of its past, jealous of its rights and dedicated to the service of the law.

This family, unique among judicial institutions, has now ceased to exist. Its members are scattered and its work is done.² But its record is more than one of passing service. Founded and loyally supported by Egyptians, it leaves behind it a judicial tradition that is part of the life of the country. Its work will shed a steady light on the administration of justice in Egypt for generations to come.

² Many of the former foreign judges have been called to other posts. Judge Qvale (Norwegian), President of the Court of Appeals and already a member of the International Court of Arbitration, has become a member of the United Nations Commission for Eritrea. Judge Struycken (Dutch) is Director of the Political Section of the European Council. Judge Murray Graham (British) has been made Legal Counsellor to the British Embassy, Cairo, his senior British colleague, Judge Blake Reed, having been awarded a knighthood, as was the case with several of his predecessors. His junior colleague, Judge Lemass, has been appointed to the Mixed Court at Tangier. Judge Cockinopoulo (Greek) is Legal Adviser to the Ethiopian Government. Judge Henry (American) has been named visiting Professor of Law at the University of Louisiana, and his American colleague, Judge Ericsson, Legal Adviser to the American High Commissioner to Germany. Certain other of the European judges have resumed the positions, which they had officially still retained, on the Benches of their several countries.

TREATY PROVISIONS FOR THE INHERITANCE OF PERSONAL PROPERTY

CONSIDERED WITH REFERENCE TO *CLARK v. ALLEN*

BY VIRGINIA V. MEEKISON

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The right of an alien to inherit real estate or the proceeds of its sale in any of the States of the United States is specifically provided for in a number of treaties currently in force between the United States and other countries; but the right of an alien to inherit personal property from a deceased American citizen is left for the most part to the discretion of our States. That is the rather surprising conclusion to be drawn from a study of the existing treaties of the United States in the light of the decision of the Supreme Court in *Clark v. Allen*.¹

The distinction in the nature of treaty guarantees regarding real and personal property has special significance at this time. Much of modern personal property is in the form of intangibles, corporate shares and bonds, which may make up a larger portion of an estate than was formerly the case. Before and during the last war certain States enacted so-called reciprocity statutes which make it difficult for many non-residents to qualify as beneficiaries of an estate in their jurisdictions.² A State inheritance tax which discriminates, perhaps as much as 20%, against non-resident aliens is a painless method of increasing the treasury.³ Such State legislation may seem, at least in some cases, to be at variance with the well-established tenet of American justice, that the testator's intent be carried out as far as possible, and that a widow or aging mother receive whatever worldly goods a decedent had acquired.

In *Clark v. Allen*, the Court considered the 1923 treaty between the United States and Germany⁴ and held that its realty provisions covered both the disposition and inheritance of real property by "any national" of either Contracting Party, without regard to the nationality of the dece-

¹ 331 U. S. 503 (1947), this JOURNAL, Vol. 42 (1948), p. 201.

² Arizona, California, Montana, Nevada, Oklahoma, Oregon; see also Connecticut, Louisiana and Texas.

³ See estate tax conventions with Canada (1944), 59 Stat. 915, the United Kingdom (1945), 60 Stat. 1391, France (1946), 63 Stat. —. See also conventions (awaiting Senate approval) signed with Ireland (1949), Sen. Exec. E, 81st Cong., 2d Sess.; Norway (1949), Sen. Exec. B, 81st Cong., 1st Sess.; and with the Union of South Africa (1947), Sen. Exec. FF, 80th Cong., 1st Sess. Various treaties afford relief from discrimination.

⁴ 44 Stat. 2132, 2185 (1923); this JOURNAL, Supp., Vol. 20 (1926), p. 4.

dent; but that the personalty provisions did not provide for inheritance by an alien of the personal property of a deceased American citizen.

The impact of this decision may be measured by the fact that 18 of the 25 United States treaties now in force, which deal with matters of disposition and inheritance of personal property, do so in language substantially identical to that used in the German treaty. The treaties affected by the *Clark v. Allen* decision are with the following countries: Austria,⁵ Bolivia,⁶ Colombia,⁷ El Salvador,⁸ Estonia,⁹ Finland,¹⁰ Great Britain¹¹ (applicable to various territories and to Australia, Canada, Ceylon, India, Ireland, New Zealand and Pakistan), Guatemala,¹² Honduras,¹³ Hungary,¹⁴ Latvia,¹⁵ Liberia,¹⁶ Norway,¹⁷ Poland,¹⁸ Spain,¹⁹ Sweden,²⁰ and Switzerland.²¹

Treaties with Argentina,²² France,²³ Paraguay,²⁴ Siam²⁵ and, by virtue of most-favored-nation provisions, with Yugoslavia,²⁶ apparently guarantee on a reciprocal basis virtual national treatment subject only to "local laws and regulations." Treaties which entered into force with China on No-

⁵ 47 Stat. 1876, 1880 (1928), supp. agreement, 47 Stat. 1899 (1931). See Department of State Bulletin, Vol. XV (1946), p. 864.

⁶ 12 Stat. 1003, 1010, 18 Stat. (Pt. 2, Pub. Tr.) 68, 71 (1858).

⁷ 9 Stat. 881, 886, 18 Stat. (Pt. 2, Pub. Tr.) 550, 552 (1846). It will be noted that Art. XII refers to "personal goods or real estate."

⁸ 46 Stat. 2817, 2820 (1926).

⁹ 44 Stat. 2379, 2380 (1925). See letters of March 26, 1948, to the 48 Governors, signed by the Legal Adviser of the Department of State, in which, with reference to attempts of Soviet consular officers and their attorneys to represent Baltic nationals in estate matters, the Department reiterated its position of non-recognition of Soviet sovereignty in Latvia, Estonia, and Lithuania. Cong. Rec., June 1, 1948, p. 6977.

¹⁰ 49 Stat. 2659, 2662 (1934).

¹¹ 31 Stat. 1939 (1899); regarding application to British Dominions, colonies, and possessions, see 31 Stat. 1941 (1900), 32 Stat. 1914, 1915 (1902); Canada, 42 Stat. 2147 (1921); supp. convention with Australia, Great Britain, and New Zealand, amending Arts. IV and VI, 55 Stat. 1101 (1936). See also consular convention with the United Kingdom (1949), Sen. Exec. A, 81st Cong., 2d Sess.

¹² Stat. 1944, 1945 (1901).

¹³ 45 Stat. 2618, 2621 (1927).

¹⁴ 44 Stat. 2441, 2444 (1925). See Department of State Bulletin, Vol. XVIII (1948), p. 382.

¹⁵ 45 Stat. 2641, 2643 (1928). See note 9, *supra*.

¹⁶ 54 Stat. 1739, 1741, 1748, 1749 (1938).

¹⁷ 47 Stat. 2135, 2138, 2139 (1928, 1929).

¹⁸ 48 Stat. 1507, 1511 (1931).

¹⁹ 33 Stat. 2105, 2107 (1902).

²⁰ 37 Stat. 1479, 1488 (1910).

²¹ 11 Stat. 587, 590, 591; 18 Stat. (Pt. 2, Pub. Tr.) 748, 749 (1850).

²² 10 Stat. 1005, 1009; 18 Stat. (Pt. 2, Pub. Tr.) 16, 18 (1853).

²³ 10 Stat. 992, 996; 18 Stat. (Pt. 2, Pub. Tr.) 249, 251 (1853).

²⁴ 12 Stat. 1091, 1095, 1096; 18 Stat. (Pt. 2, Pub. Tr.) 594, 596 (1859).

²⁵ 53 Stat. 1731, 1732 (1937).

²⁶ 22 Stat. 963, 964 (1881). See Department of State Bulletin, Vol. XIII (1945), p. 1020, and *id.*, Vol. XIV (1946), p. 728.

vember 30, 1948,²⁷ and with Italy on July 26, 1949,²⁸ and those signed (but not yet in force) with Uruguay,²⁹ and Ireland,³⁰ seem clearly outside the *Clark v. Allen* decision.

The purpose of this paper is to analyze the decisions in *Clark v. Allen* with respect to personal property, and certain earlier Supreme Court and State court decisions, and then to examine a few individual treaties for possible distinguishing features.

THE DECISION IN CLARK V. ALLEN

Alvina Wagner, a resident of California, made a will on December 23, 1941, by which she disinherited her California relatives and left her property to four members of her family who were resident in and were nationals of Germany. She died in June, 1942; and in December of that year six of her California relatives filed a petition for determination of heirship, claiming that under California law German nationals were ineligible as legatees and that therefore they, the California relatives, should be considered sole heirs. On January 23, 1943, the Alien Property Custodian vested in himself all right, title and interest of the German heirs in the estate and brought suit against the executor of the estate and the six California heirs-at-law in the District Court of the United States for the Northern District of California, claiming the entire net estate, after payment of administration and other expenses. The Attorney General of California thereupon came in to defend the constitutionality of the California statute.

The statute in question conditioned the right of aliens not residing in the United States to inherit property in California upon (1) the existence of reciprocal inheritance rights in American citizens in the country of which the alien is a resident and citizen; and (2) the rights of American citizens to receive payment within the United States of moneys originating from estates of persons dying in such foreign country.³¹

Article IV of the Treaty of Friendship, Commerce, and Consular Rights between the United States and Germany, signed December 8, 1923, con-

²⁷ Department of State, *Treaties and Other International Acts Series*, No. 1871; this JOURNAL, Supp., Vol. 43 (1949), p. 27.

²⁸ *Treaties and Other International Acts Series*, No. 1965. The Sup. Ct. of Los Angeles Co., Calif., ruled, in the absence of treaty, that reciprocity exists with Italy. *Estate of Gamberi*, No. S.M.P. 1530 (Jan. 1950).

²⁹ Sen. Exec. D, 81st Cong., 2d Sess.

³⁰ Sen. Exec. H, 81st Cong., 2d Sess.

³¹ Ch. 895, California Statutes, 1941, added to the California Probate Code secs. 259, 259.1, and 259.2 which were in force at the time of the death of testatrix. See *In re Giordano's Estate*, 193 Pac. (2d) 771 (1948), affirming prior opinion, 191 Pac. (2d) 757 (1948); *Estate of Knutzen*, 191 Pac. (2d) 747 (1948); *Estate of Bevilacqua*, 191 Pac. (2d) 752 (1948); and *Estate of Thramm*, 183 Pac. (2d) 97 (1947).

tains reciprocal provisions regarding inheritance and disposal of real and personal property.⁸² It provides:

Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

The District Court granted judgment for the Custodian on the pleadings, holding that the California statute was unconstitutional. The Circuit Court of Appeals reversed the judgment on the grounds that the matter was exclusively within the probate jurisdiction of a state court. The Supreme Court reversed the Circuit Court and remanded the cause to it for consideration on the merits. The Circuit Court thereupon held for the respondents, the California relatives, holding that Article IV of the 1923 treaty had been abrogated by the declaration of war; that its terms were incompatible with a state of war; and that the California statute was constitutional. The case went to the Supreme Court on *certiorari*. Mr. Justice Douglas delivered the opinion of the Court. It was unanimous, except where Mr. Justice Rutledge declined to concur in the ruling regarding the personal property.⁸³

The Supreme Court reversed the Circuit Court as to the effect of the war on Article IV, and ordered distribution of the proceeds from the realty to the Custodian. The Circuit Court was affirmed as to the constitutionality of the statute, which was held to control distribution of the

⁸² *Supra*, note 4.

⁸³ *Crowley v. Allen*, 52 F. Supp. 850 (N.D. Cal. 1943); *Allen v. Markham*, 147 F. (2d) 138 (C.C.A. 9th, 1945); *Markham v. Allen*, 326 U. S. 490 (1946); *Allen v. Markham*, 156 F. (2d) 653 (C.C.A. 9th, 1946); *Clark v. Allen*, 331 U. S. 503 (1947), this JOURNAL, Vol. 42 (1948), p. 201.

personal property if the deceased were an American citizen. The cause was then remanded to the District Court for further proceedings. In 1949 the personal property was finally distributed to the Custodian after a finding that Alvina Wagner was in fact a German national.

The decision was significant, first, because the Court had not hitherto ruled directly on the effect of war on treaty provisions regarding inheritance of property. The Court reviewed the policy and conduct of our "political departments" during the war and since its close, and concluded that the provisions of Article IV concerning the right of inheritance should be regarded as having continued in force despite the war. This ruling approves and makes authoritative a series of lower court decisions and is in harmony with the current thinking of text-writers.³⁴ Most civilized countries have come to recognize and make some attempt to protect private rights of enemy aliens in wartime. The protection afforded is a bit ironical, however, in view of the fact that the benefits accruing from the private right so recognized are immediately taken away by distribution to the Alien Property Custodian, who may never be required to release the proceeds of the inheritance to the alien beneficiary.

The Court ruled that so far as Article IV conflicts with the California statute, that statute is superseded; but dismissed as "far-fetched" the contention that the California statute is an extension of State power into the forbidden field of foreign affairs.

It has long been settled and accepted that a treaty provision will override a State statute to the contrary, and, if the treaty is later in date, a Federal statute.³⁵ Likewise, the right of either citizen or alien to dispose of his property by will, and to succeed to the property of a decedent, has always been considered a privilege granted by the State, and within legislative control.³⁶ Moreover, in 1850, Mr. Justice Taney said that if a State may deny to the alien the privilege of inheriting, it may attach to a grant of the privilege any conditions the State supposes its interests or policy require.³⁷

The most significant part of *Clark v. Allen*, thus, was the sharp distinction as to the juridical effect of the real and personal property provisions. As to the first paragraph of Article IV the Court said:

The rights secured are in terms a right to sell within a specified time plus a right to withdraw the proceeds and an exemption from dis-

³⁴ See Lenoir, "The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions," 34 Georgetown L. J. (1946) 129.

³⁵ *Missouri v. Holland*, 252 U. S. 416, 430-435 (1920). Cf. Rose's Notes on U. S. Reports (1932), Supp. II, p. 935; see also *Hauenstein v. Lynham*, 100 U. S. 483, 488-490 (1879); *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 602, 627 (1812); *Ware v. Hylton*, 3 Dall. 199, 242 (1796).

³⁶ *U. S. v. Fox*, 94 U. S. 315 (1876); *U. S. v. Perkins*, 163 U. S. 625 (1896).

³⁷ *Mager v. Grima*, 8 How. 490 (1850).

criminary taxation. It is plain that those rights extend to the German heirs of "any person" holding realty in the United States. And though they are not expressed in terms of ownership or the right to inherit, that is their import and meaning.

The Court assumed that portions of the Trading with the Enemy Act, as amended,⁸⁸ and Executive Orders issued thereunder, "abrogate the parts of Article IV of the treaty dealing with the liquidation of the inheritance and the withdrawal of the proceeds, even though the Act provides that the prohibited activities and transactions may be licensed."

The Court reviewed certain earlier decisions involving provisions similar to the second paragraph of Article IV in other treaties, each of which had been held not to cover the case of a citizen or subject of one of the contracting parties, residing at home, and disposing of property there in favor of a citizen or subject of the other. The Court said:

The construction adopted by those cases is, to say the least, permissible when the syntax of the sentences dealing with realty and personality is considered. So far as realty is concerned, the testator includes "any person"; and the property covered is that within the territory of either of the high contracting parties. In case of personality, the provision governs the right of "nationals" of either contracting party to dispose of their property within the territory of the "other" contracting party; and it is "such personal property" that the "heirs, legatees and donees" are entitled to take.

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We accordingly hold that Article IV of the treaty does not cover personality located in this country and which an American citizen undertakes to leave to German nationals. We do not know from the present record the nationality of Alvina Wagner. But since the issue arises on the Government's motion for judgment on the pleadings, we proceed on the assumption less favorable to it, viz., that she was an American citizen.

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. . . If she was an American citizen, disposition of the personality is governed by California law.

The cause was then remanded to the District Court.

Mr. Justice Rutledge joined in the Court's opinion as to the realty but declined to concur in its other phases. He said that a decision made by "hypothesizing" might well be rendered "both moot and advisory" if Alvina Wagner were found to be a German national. The dissent was prophetic.

HISTORICAL BACKGROUND

A difference in what they were intended to accomplish accounts historically for the difference in construction of the realty and personality

⁸⁸ 50 U.S.C., App. sec. I—39, 616, 617. As to possible return of property held by the Custodian, see Public Law 671, 79th Cong., and Cong. Rec., Jan. 26, 1950, pp. 971-972.

provisions. In the absence of treaty, matters of disposition and succession are governed by local law.³⁹ Resident aliens are protected by the 14th Amendment of the Constitution from undue discrimination. However, the common law, except as modified by legislatures, is, in many States, the local law which governs the rights of non-resident aliens. The restrictions of the common law and the *jus gentium* are much more severe as to real property than as to personal property. If an alien died without having conveyed land acquired by devise or descent, according to the common law the land vested immediately in the state, without the necessity of inquest of office found. For an alien to transmit by descent, and an alien to take by descent, there must be separate statutory authority for each act.⁴⁰ Treaty provisions regarding real property were therefore carefully phrased to preserve the traditional right of a State to determine for itself who could and who could not acquire and hold land in its jurisdiction, but at the same time to protect the alien beneficiary from monetary loss. Mr. William M. Gibson says that the United States has not entered into any treaties which completely deprive States of the power to legislate in this field. While treaties negotiated after World War I are more generous than earlier treaties, he finds that State statutes give the alien the most liberal treatment.⁴¹

Treaty provisions regarding personal property were directed primarily at the elimination of discriminatory taxes, relics of feudalism, on the alien's enjoyment of his inheritance. Under the dreaded *droit d'aubaine* all the property of a deceased foreigner was confiscated to the use of the sovereign. Under the *droit de détraction* or *droit de retrait* (*jus detractûs*) a tax was levied upon the removal from one State to another of property acquired by succession or testamentary disposition. Prior to World War II, the alien had come to be free to inherit and dispose of personal property almost at will in the States and in Europe, subject only to payment of taxes. Professor Borchard wrote in 1915 and again in 1928 that the power to acquire, own and dispose of personal property is a universally recognized right of aliens.⁴² The Justice Department stated that, so far as it was aware, "on July 1, 1941, there was no civilized nation which did not grant to citizens of the United States the right to inherit from its nationals, with limitations, however, upon the inheritance of real property."⁴³

The Attorney General contended in *Clark v. Allen* that the negotiators of the German treaty had intended to provide for rights of inheritance as well as for freedom from discriminatory taxes, and had not intended any

³⁹ See *Lyeth v. Hoey*, 305 U. S. 188, 193 (1938); *Irving Trust Co. v. Day*, 314 U. S. 556, 562 (1942).

⁴⁰ *Donaldson v. State of Indiana*, 67 N.E. 1029 (1903).

⁴¹ Gibson, *Aliens and the Law* (1940), p. 37.

⁴² Borchard, *The Diplomatic Protection of Citizens Abroad* (1915 and 1928 ed.), p. 88.

⁴³ *Estate of Bevilacqua*, 161 Pac. (2d) 589, 595 (1945).

distinction based on nationality of the decedent. He argued that references from the first clause of the personalty provisions should be incorporated into the second clause, and that the word "such" preceding the words "personal property" in the second clause was not intended to carry the "extremely heavy freight of meaning" attributed to it. The second clause could then be read as a grant of rights of succession independent of the limitations of the first clause. He asked that it be read as follows:

and the(ir) heirs, legatees and donees [of nationals of either High Contracting Party], of whatsoever nationality, whether resident or non-resident, shall succeed to (such) personal property [of every kind within the territories of the other].⁴⁴

This construction was defended by an exhaustive study of the historical background of the provision in question. Diplomatic correspondence was cited to support the contention that identical or substantially identical language in other treaties had always been understood by negotiators and contracting parties as granting rights of inheritance of personal property regardless of a decedent's nationality.⁴⁵

The Court rejected the contention and said:

Petitioner, however, presents a detailed account of the history of the clause which was not before the Court in *Frederickson v. Louisiana*, *supra*, and which bears out the construction that it grants the foreign heir the right to succeed to his inheritance or the proceeds thereof. But we do not stop to review that history. For the consistent judicial construction of the language since 1860 has given it a character which the treaty-making agencies have not seen fit to alter. And that construction is entirely consistent with the plain language of the treaty. We therefore do not deem it appropriate to change that construction at this late date, even though as an original matter the other view might have much to commend it.

The decision would appear contrary to the intent of the negotiators. However, the "plain language" of the provision, which is drafted in terms of the right of an alien to dispose of his property, justifies the Court's construction. The Court may have reasoned that resort to background information and intent of the negotiators should be made only in cases where language is not "plain." Also, the Court may have reasoned that the Department of State, by including similar provisions in treaties signed after the Court had ruled that such a provision had only limited applicability, could be considered to have acquiesced in the Court's earlier interpretation.

⁴⁴ Brief for the Petitioner, U. S. Sup. Ct., Oct. Term 1946, No. 626, p. 36.

⁴⁵ Diplomatic Correspondence of the United States, 1868, Pt. II, pp. 194, 196, 197; Foreign Relations of the United States, 1880, pp. 952, 953. See also Moore, *Digest of International Law* (1906), Vol. XV, p. 6.

JUDICIAL HISTORY OF THE PROVISION

A study of the four earlier cases relied upon by the Court may shed some light on why the language of Article IV has continued to appear in our treaties. Each of these cases involved discriminatory State inheritance taxes, and only by implication involved the direct question of the treaty right of an alien to inherit or succeed to the property of an American citizen. The ruling in the first case amounted almost to *dicta*, as the statute in question was found to be non-discriminatory. The second case, on the authority of which the same Court affirmed the third and fourth cases, concerned a treaty provision which was not really comparable to Article IV of the German treaty. The four decisions were rendered in 1860 and 1917, and their implications were perhaps overlooked by new administrations beset with more pressing postwar problems. State courts on the whole appeared to hold that the language, especially as "cleaned up" and used in modern treaties, permitted aliens to inherit regardless of the decedent's nationality. This apparently satisfied other countries. Americans met with few difficulties in connection with succession to estates abroad until the Nazi régime, and even then the German Government did not defend its position on the grounds that a decedent had been a foreign national.⁴⁶

*Frederickson v. Louisiana*⁴⁷ arose out of the claim of Louisiana to tax a legacy by a Louisiana citizen to a subject of Württemberg, under a statute which provided that a person not domiciled in Louisiana and not a citizen of any other State or territory should be liable to a 10% succession tax. Plaintiff claimed that the tax was a discrimination and was forbidden by the treaty of 1844 with Württemberg,⁴⁸ Article III of which is substantially identical with the personalty provisions of the German treaty. The Supreme Court held that since the Louisiana court had ruled in another case that a citizen of Louisiana domiciled abroad was subject to the tax, the statute made no discrimination between citizens of the State and aliens in the same circumstances. However, the Court said that it concurred with the Supreme Court of Louisiana that the treaty does not regulate testamentary dispositions of citizens of either country with reference to property in their country of origin or citizenship. The treaty was intended only to protect an alien from onerous taxes on property he possessed in the territory of the other, and the case of a citizen at home disposing of his property there in favor of a citizen of the other "was not in the contemplation of the contracting Powers, and is not embraced in this article of the treaty."

Württemberg in 1868 severely criticized the decision as contrary to the plain meaning of the treaty, which she interpreted as an agreement that

⁴⁶ Hackworth, *Digest of International Law* (1942), Vol. III, p. 667.

⁴⁷ 23 How. 445 (1860).

⁴⁸ 8 Stat. 538 (1844); 18 Stat. (Pt. 2, Pub. Tr.) 809.

subjects of Württemberg should be placed on the same footing with inhabitants of the United States. The authorities of Württemberg had consistently adhered to that theory, and interpreted the treaty "as having been made rather for the benefit of the living than for that of the dead . . ." If the intent was to relieve heirs, legatees, and donees from duties of *détraction*, it could make no difference to such persons whether the country from whence the inheritance came was or was not the native country of the deceased. The Secretary of State explained that the Department was bound by the decision of the Supreme Court, and offered to make a new treaty, but the inclusion of Württemberg in the German Empire in 1871 ended the matter.⁴⁹

The Supreme Court in 1917 found the Frederickson case "aptly illustrative and persuasively controlling" in the case of *Petersen v. Iowa*.⁵⁰ The Petersen case concerned the estate of a naturalized American who died seised of property in Iowa. His legatees in Denmark protested an Iowa decision under a statute which imposed heavier taxes on estates passing to non-resident aliens than to residents of Iowa, claiming that it was a violation of the treaty of 1826 with Denmark. That treaty, which is still in force, does not contain a provision regarding rights of inheritance such as Article III of the Württemberg treaty or Article IV of the German treaty. It does contain a most-favored-nation provision "in respect of commerce and navigation," and then bars, in Article VII, discrimination in the imposition of removal taxes.⁵¹

The Supreme Court held that the most-favored-nation clause was not applicable here because of its limitation to commerce and navigation. The Court then said of Article VII:

. . . that which is contracted against is merely a departure by discrimination by either one of the countries against the citizens of the other and their property therein from the legislation governing their own citizens. In other words, the right of the citizens of each of the contracting countries reciprocally to own, dispose of or transmit their property situated in the other country, free from provisions or restrictions discriminating because of alienage, is in the largest possible sense that which is protected by the treaty.

. . . The duty to pay on such property which preceded and accompanied the right of such foreign legatees was not a burden upon their right to remove their property, as such right of property on their part was dependent on the payment and could not and did not arise until the payment was made.

⁴⁹ 11 Foreign Consuls in the United States MSS., Nat. Archives. See Bancroft Davis, *Notes upon Treaties of the United States of America and Other Powers* (1873), p. 159.

⁵⁰ 245 U. S. 170 (1917).

⁵¹ 8 Stat. 340, 342; 18 Stat. (Pt. 2, Pub. Tr.) 167, 169 (1826); abrogated in 1856 and renewed in 1857, except for Art. V.

It will be seen that the decision was on technical grounds, that a succession tax, which was unknown in 1826, was different from a removal tax, which was known and provided for by the treaty of 1826. The Danish Minister had been quite unable to see this fine distinction when the State of Iowa had advanced it earlier. In a memorandum to the Department of State in 1921, the Minister had protested that the wording of Article VII does not consider the status of the testator, but merely that of the legatee, and assures freedom of removal on terms of equality with citizens or subjects of the State from which removal is made; and that interpretation had previously been respected in other States, even in Iowa.⁵²

*Duus v. Brown*⁵³ concerned the Iowa tax statute as applied to the estate of a naturalized citizen accruing to his collateral heirs in Sweden. Article VI of the treaty of 1783 with Sweden⁵⁴ provides for the disposition and inheritance of "goods and effects" in language which was a forerunner of Article X of the treaty of 1785 with Prussia,⁵⁵ carried over into the 1923 German treaty. Article II contains the same most-favored-nation provision as the Danish treaty of 1826. Article III contains an additional provision, also found in several of our current treaties, which grants most-favored-nation treatment with regard to payment of "duties and imposts" which might be levied "in the ports, havens, roads, countries, islands, cities and towns of the United States, or any of them. . . ."

The Supreme Court held that Article VI embraces only subjects of Sweden and their property in Iowa and, as pointed out in *Petersen v. Iowa*, has no relation to the right of the State to deal by death duties with its own citizens and their property within that State. The most-favored-nation provision, following the *Petersen* case, applies only in respect of commerce and navigation.

The succession tax or removal tax controversy is resolved partially by a literal reading of the clause. It might be suggested that an equally literal reading of Article III might permit the inclusion of "death duties" in the "duties and imposts" mentioned therein. The latter phrase was unquestionably intended to mean with respect to commerce and navigation, but mere intent of the negotiators has not seemed completely to control in these cases.

The modern theory of inheritance taxes was unknown when older treaties were negotiated, and the Supreme Court itself has entertained diverse theories on inheritance taxes. The Court has held variously that they were or were not taxes on succession, disposition, or removal, or that such

⁵² Hackworth, *op. cit.*, Vol. III, pp. 670-671. ⁵³ 245 U. S. 176 (1917).

⁵⁴ 8 Stat. 60, 64 (1783); revived as to certain articles by the treaty with Sweden and Norway, 8 Stat. 232 (1816), and again revived, 8 Stat. 346 (1827).

⁵⁵ 8 Stat. 84, 88 (1785).

taxes were not affected by a treaty because they were not within the contemplation of the parties at the time of signing.⁵⁸

The case of *Skarderud v. Tax Commissioner of North Dakota*⁵⁷ was affirmed *per curiam* on the authority of *Duus v. Brown, supra*, decided on the same day.

TREATIES WITH NORWAY AND SWEDEN

A Washington State Court held in 1910 that a Norwegian heir of an American citizen was protected by the treaty of 1827 with Norway and Sweden (the 1783 treaty as revised and extended) from any discriminatory tax upon a legacy.⁵⁸ The court interpreted the treaty provision as having been drafted for the benefit of the recipient. The Iowa Supreme Court in 1915 disagreed vigorously with this decision.⁵⁹

Article XIV of the present treaty with Sweden, signed in 1910, appears to provide substantially the same with respect to personalty as did the Württemberg treaty, yet the Supreme Court of Iowa in 1919 sustained the claim of the non-resident alien heirs that Article XIV forbids the imposition of a discriminatory estate tax under the Iowa statute.⁶⁰ The court referred to the decisions discussed *supra* and said they were not controlling, as the language in the 1910 treaty is not "equivalent." Likewise, the Kansas Supreme Court held in 1925 that:

Obviously it was meant to provide that Swedish heirs or devisees should be entitled to inherit personal property or receive it by testament, not only from citizens of the United States, but also from residents of the United States who died subjects of the King of Sweden.⁶¹

Article IV of our 1928 treaty with Norway contains a personalty provision almost identical to that in the German treaty, but concludes the paragraph with an additional sentence as follows:

In the same way, personal property left to nationals of one of the High Contracting Parties, and being within the territories of such other Party, shall be subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

This sentence should at least protect Norwegian heirs from discriminatory taxes on inheritances in States which permit aliens to inherit personal property from American citizens.

⁵⁸ See Hyde, *International Law* (2d ed., 1945), Vol. I, pp. 663-676.

⁵⁷ 245 U. S. 633 (1917). See also *Nielsen v. Johnson*, 279 U. S. 47 (1929), this *JOURNAL*, Vol. 23 (1929), p. 422; W. R. Vallance, *ibid.*, p. 395.

⁵⁸ *In re Stixrud's Estate*, 109 Pac. 343 (1910).

⁵⁹ *In re Peterson's Estate*, 151 N.W. 66 (1915), *aff'd as Duus v. Brown*, 245 U. S. 176.

⁶⁰ *Brown v. Peterson*, 170 N.W. 444, 445 (1919).

⁶¹ *Olsson v. Savage*, 240 Pac. 586, 587 (1925).

TREATY WITH GREAT BRITAIN

Court decisions regarding Article II of the treaty of 1899 with Great Britain have contributed to the confusion which continues to cloud such provisions. An Iowa court in 1915 rejected the contention that Article II of the treaty was not applicable to the case at bar because decedent was not an alien.⁶² However, in a supplemental opinion on rehearing, the court said that it preferred to rest its opinion on the grounds indicated in another case, which rested on an interpretation of the most-favored-nation clause. Article V of the treaty of 1899 provides for most-favored-nation treatment "In all that concerns the right of disposing of every kind of property, real or personal . . ." The court in the latter case cited four treaties with other countries (of which only the 1853 treaty with Argentina is now in force) and said that those treaties, by virtue of Article V, eliminated "whatever ambiguities there may be" in Articles I and II of the British treaty; that the rights of the donee and donor were interdependent and therefore neither could be abridged; and that the right of a donee to receive "is something which concerns the right of disposing."⁶³ A North Dakota court found Article II of the 1899 treaty "neither obscure nor ambiguous" and ruled in favor of the British heirs.⁶⁴

The most-favored-nation provision may continue to be held to distinguish the British treaty from the German treaty. However, since *Clark v. Allen*, a claimant would seem to be on rather thin ice in asserting that "all that concerns the right of disposing" includes within its meaning the right of acquiring.

TREATY WITH SWITZERLAND

The property provisions of our treaty of 1850 with Switzerland have also been much litigated. Article V deals with personalty in terms comparable to the German treaty. It then states that those provisions shall be applicable to real estate in any of the States or Cantons "in which foreigners shall be entitled to hold or inherit land," but that if real estate "should fall" to an alien who was not permitted to hold land there, he should have "such term as the laws of the State or canton will permit" to sell the property and withdraw the proceeds.

Most of the decisions on the Swiss treaty have involved construction of the realty provisions as they affect State laws. However, a District of Columbia court, in a case which involved the estate of a deceased American, held in 1882 that Article V covers the inheritance of personal property wherever it may be located.⁶⁵ The court said that the treaty could not have been intended to confine its benefits to places where there already

⁶² *In re Moynihan's Estate*, 151 N.W. 504 (1915); 154 N.W. 904 (1915).

⁶³ *Brown v. Daly's Estate*, 154 N.W. 602, 603 (1915).

⁶⁴ *Trott v. State*, 171 N.W. 827, 830 (1919).

⁶⁵ *Jost v. Jost*, 1 Mackey (12 D.C.) 487, 494 (1882).

existed the right of an alien to inherit or to hold by inheritance. The Supreme Court expressed much the same thought in 1879, in considering the overriding effect of that treaty on Virginia laws: "Otherwise the language used is a sham and a mockery."⁶⁶ However, the latter case concerned the estate of a Swiss citizen who had died in Virginia leaving realty which had been sold by the escheator, and is not directly in point.

TREATY WITH ARGENTINA

The Argentine Treaty of 1853 marks perhaps the high-water point of generosity to aliens. It provides in Article IX that:

In whatever relates to the . . . acquiring and disposing of property of every sort and denomination . . . the citizens of the two contracting parties shall reciprocally enjoy the same privileges, liberties and rights, as native citizens, and they shall not be charged, in any of these respects, with any higher imposts or duties than those which are paid or may be paid by native citizens, submitting of course to the local laws and regulations. . . . the Consul . . . shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country. . . .

A number of controversies have arisen as to the effect of this article. In 1879 the United States Government protested to the Argentine Government that an Argentine "local law" providing for escheat of an estate not claimed within one year from the decease "must be looked upon as hostile to the true animus of the provisions of Article IX" and should not be used to defeat the claims of the American heirs of an American citizen murdered in Argentina.⁶⁷ It will be recalled that an Iowa court held that Article IX, which was being considered with regard to the most-favored-nation clause in the 1899 treaty with Great Britain, protected an Argentine heir from discriminatory inheritance taxes.⁶⁸ However, local laws were held to defeat the claim of the Italian consul to administer an estate by virtue of the most-favored-nation clause of a treaty with Italy⁶⁹ and by reference to the Argentine treaty.⁷⁰

TREATY WITH FRANCE

Article VII of the treaty of 1853 with France, which has also been much litigated, provides that:

In all the States of the Union whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, French-

⁶⁶ *Hauenstein v. Lynham* (*supra*, note 35), at p. 486.

⁶⁷ *Moore, op. cit.*, Vol. IV, p. 6. ⁶⁸ *Brown v. Daly's Estate*, *supra*, note 63.

⁶⁹ 20 Stat. 725, 732 (1878). See Department of State Bulletin, Vol. XVIII (1948), p. 248.

⁷⁰ *Bocca v. Thompson*, 223 U. S. 317 (1931).

men shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States.

The Supreme Court said in 1856 that "the treaty does not claim for the United States the right of controlling the succession of real or personal property in a State." However, although a discriminatory Louisiana statute was "existing" at the time the treaty was signed, and had not been repealed, since the highest court of Louisiana had said that Louisiana was one of the States in which the treaty was to be carried into effect, the Supreme Court concurred that the non-resident French claimant was not subject to a discriminatory inheritance tax.⁷¹

This same provision was considered by the Supreme Court of California in 1923. The State of California claimed that non-resident French heirs-at-law were barred from succeeding to an estate because they had not appeared and claimed the succession within five years after the death of the decedent, as stipulated by the statute applicable to non-resident claimants. The court decided adversely to the State's contention that the treaty provides for equality only with respect to the right of possessing property, not of inheritance, and that one possesses property only after it has come to him by inheritance, purchase, gift, or otherwise. The court drew attention to the property rights guaranteed to resident aliens by the State constitution of 1849, and said that:

. . . under our laws, considering them as unaffected by the treaty provisions, if such heirs are non-resident aliens, the estate which vests in them upon the death of the ancestor is not an absolute or unconditional estate, as in the case of citizen heirs, subject only to be divested in the process of administration, but it is a conditional estate, upon the condition subsequent that if they fail to appear and claim the same within five years their right ceases and the property then vests in the state. . . . It cannot be said under these circumstances that under the state law as unaffected by the treaty the non-resident alien enjoys the right of possessing property "by the same title and in the same manner as the citizens of the United States."⁷²

TREATY WITH YUGOSLAVIA

Article II of the treaty of 1881 with Serbia, now Yugoslavia, provides for a combination of national and most-favored-nation treatment. It reads as follows:

In all that concerns the right of acquiring, possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy

⁷¹ *Prevost v. Grenaux*, 19 How. 1 (1856). Distinguishable, as the estate vested before the treaty entered into force. See also *De Geofroy v. Riggs*, 133 U. S. 258 (1890).

⁷² *In re Romaris' Estate*, 218 Pac. 421, 423 (1923).

the rights which the respective laws grant in each of these states to the subjects of the most favored nation.

Within these limits, and under the same conditions as the subjects of the most favored nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any manner whatever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favored nation.

They shall likewise be at liberty to export freely the proceeds of the sale of their property, and their goods in general, without being subjected to pay any other or higher duties than those payable under similar circumstances by natives or by the subjects of the most favored state.

According to official statements furnished by the Yugoslav Government, Americans are permitted to inherit property in Yugoslavia, but withdrawal of proceeds is not generally possible under present exchange controls. The agreement for the settlement of pecuniary claims against Yugoslavia, signed July 19, 1948, is of interest in this connection.⁷³ It has been claimed that domestic Yugoslav law regarding nationalization of property, agrarian reform, and dual nationality may limit the value of both the national treatment and most-favored-nation treatment guaranteed by the 1881 treaty. The Superior Court of San Francisco held, in *Re Estate of Charles J. Arbulick*, that reciprocity does not exist with Yugoslavia.⁷⁴ It is understood the case is to be appealed.

NEW STATES

The recent decision of the Supreme Court of New Hampshire in *Hanafin v. McCarthy*, that our 1899 property convention with Great Britain continues to apply to Ireland, is of interest in connection with the problem of continued applicability of existing treaties to new states.⁷⁵ The relationship of successor to parent state is a complicated one, and one which may have changed subtly over the years. However, considering all the attendant circumstances, it would appear that the 1899 treaty with Great Britain, which had been made applicable to the areas now comprising Ceylon, India, and Pakistan, should be considered as presently applicable to those states.⁷⁶

The Czechoslovak Ministry of Justice in 1920 advised Czechoslovak courts that in relations with the United States the procedure in the settlement of estates should follow the Treaty of Commerce and Navigation of August 27, 1829,⁷⁷ and the Convention Relative to Disposal of Property

⁷³ 62 Stat., Pt. 3,—. Treaties and Other International Acts Series, No. 1803.

⁷⁴ Superior Ct. of San Francisco Co., Calif., Oct. 20, 1949.

⁷⁵ 57 Atl. (2d) 148 (1948), this JOURNAL, Vol. 42 (1948), p. 499.

⁷⁶ See Indian Independence (International Arrangements) Order, 1947; and the United Kingdom-Ceylon External Affairs Agreement of Nov. 11, 1947.

⁷⁷ 8 Stat. 898; 18 Stat. (Pt. 2, Pub. Tr.) 21.

and Consular Jurisdiction of May 8, 1848,⁷⁸ concluded between the United States and Austria-Hungary. This policy, reportedly still in effect, is purely a matter of Czechoslovak law. Neither of the above-mentioned treaties is in force at this time between the United States and Austria. More important, the United States has never regarded treaties concluded with Austria-Hungary as being in force between the United States and Czechoslovakia, despite the fact that Czechoslovak territory had been formerly a part of the territory of Austria-Hungary.

INTERPRETATION OF TREATIES

The decision in *Clark v. Allen* may presage an era of strict construction of treaties. However, if the language is ambiguous, well-established principles of construction with respect to treaties may permit a court to "quote scripture" for any one of several possible rulings. The Supreme Court has said repeatedly that, in general, treaties are to be construed liberally, and their words taken in their ordinary meanings.⁷⁹ Private rights are to be protected as far as possible. Mr. Justice Story said in an estate case decided in 1830:

If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?⁸⁰

The importance of such reasoning as a general proposition is questioned by certain text-writers who emphasize that the intent of the negotiators should govern the interpretation of doubtful provisions.⁸¹ A construction of a treaty acted on by the Executive Department has frequently been accepted by the judiciary.⁸² Courts here and abroad have repeatedly resorted to background material to ascertain the intent and to aid in the interpretation of doubtful provisions in treaties.⁸³

Treaty provisions which have the effect of overriding State laws are usually strictly construed. Courts have repeatedly denied the claims of consuls to administer estates of aliens in derogation of local law.⁸⁴ It might be argued that the right of a foreign consul to administer a dece-

⁷⁸ 9 Stat. 944; 18 Stat. (Pt. 2, Pub. Tr.) 24.

⁷⁹ *Hauenstein v. Lynham*, *supra*, note 35; *De Geofroy v. Riggs*, *supra*, note 71; *U. S. v. Anguisola*, 1 Wall. 352 (1863); *U. S. v. Payne*, 264 U. S. 446 (1924). See Hall, *International Law* (8th ed., 1924), pp. 393-394.

⁸⁰ *Shanks v. Dupont*, 3 Pet. 242, 247 (1830).

⁸¹ Hyde, *op. cit.*, Vol. II, pp. 1478-1485.

⁸² See *U. S. v. Payne*, *supra*, note 79; *Sullivan v. Kidd*, 254 U. S. 433 (1921).

⁸³ See Wharton, *Digest of International Law* (2d ed., 1887), Vol. II, pp. 36-37; Lauterpacht, "Some Observations on Preparatory Work in the Interpretation of Treaties," 48 *Harvard Law Review* (1935) 549; *cf. Factor v. Laubenheimer*, 290 U. S. 276 (1933), *this JOURNAL*, Vol. 28 (1934), p. 149; *Terrace v. Thompson*, 263 U. S. 197 (1923), *this JOURNAL*, Vol. 18 (1924), p. 346.

⁸⁴ *Chryssikos v. De Marco*, 107 Atl. 358, 360 (1919).

dent's estate affects more a procedural than a substantive right, but it seems clear from the cases discussed above that even in substantive matters courts are not disposed to interpret ambiguous provisions in such a way as to supersede State laws.

RELATED PROBLEMS

"The finespun web encasing alien property matters is not easy to untangle," a Federal judge has commented.⁸⁵ The ruling in *Clark v. Allen*, that a treaty provision granting an absolute right to inherit will override the requirements of a State statute, removes only one thread. There may be no treaty provision applicable. The treaty provision may be ambiguous. It may be so broadly reciprocal in character as to open the question of the extent to which the other contracting party is complying with its terms. Definitions of real and personal property vary from country to country, raising questions of conflict of laws. To prove foreign law is always difficult, and is especially so where Americans have been permitted to inherit only by unwritten law and practice. Currency and foreign exchange controls present intricate problems even to experts. If all these problems are satisfactorily resolved, the administrator and the judge may have to consider the conflicting instructions of a foreign consul and the alien heir regarding distribution of the proceeds. Countless cases bearing on these questions are currently being litigated, and it is possible only to indicate certain considerations which may influence the decisions.

Whether or not German municipal law afforded to American citizens reciprocal rights of inheritance is the principal issue in several hundred cases pending in California and Oregon. Similar issues exist in Montana and Nevada. The Attorney General contends in effect that: (1) the legislature did not intend to require immediate payment in enacting the statute; and (2) German laws satisfy the condition. Nazi laws discriminated against segments of the German people but did not discriminate against United States citizens as such. Further, the Allied Control Council has repealed discriminatory laws and given the repealer retroactive effect.

The Superior Court of Los Angeles County passed on this issue twice within two weeks, deciding in favor of the Attorney General in one instance⁸⁶ and adversely to him in the second.⁸⁷ The Attorney General has appealed the latter decision.

⁸⁵ *Iwazo Yamashita v. Clark*, 75 F. Supp. 51, 55 (1948). See *In re Blak's Estate*, 150 Pac. (2d) 567 (1944), with respect to blocked accounts.

⁸⁶ *Estate of Peters*, Superior Ct. of Los Angeles Co., Calif., No. 233316, June 8, 1948. In *Estate of Reihls*, wherein the decedent's death occurred after Allied occupation of Germany, the Superior Court of Los Angeles Co., Calif., No. 263185, on Nov. 16, 1949, again ruled in favor of reciprocity.

⁸⁷ *Estate of Bertha Schluttig*, Superior Ct. of Los Angeles Co., Calif., No. 242226, June 22, 1948 (both German and Austrian heirs); *Estate of Hess*, 18 L.W. 2362. See also *Estate of Wemme*, No. 56-621, Circuit Ct. of Oregon, Multnomah Co., May 24, 1949.

The intentions of the testator may thus be defeated either because the alien heir is held ineligible to take under a State reciprocity statute, or because the Attorney General claims the inheritance under the Trading with the Enemy Act. Various devices have been used in attempts to evade the operation of the latter Act. If the provision in the will can be construed as a condition subsequent, payment only being deferred, courts will generally award the fund to the Attorney General.⁸⁸ A provision for alternate contingent remainders over to American citizens in the event that enemy nationals are unable to receive payment may convince the court that a condition precedent was intended. In such cases, courts generally hold that the gift fails and refuse payment to the Attorney General.⁸⁹

CONCLUSION

Treaty provisions regarding inheritance are contained usually in treaties of friendship, commerce, and navigation, sometimes in establishment or consular conventions. Consular conventions usually provide also that a consular officer may represent his nationals in estate matters, and receipt for their distributive shares, and sometimes provide specifically with respect to seamen's estates. A treaty of friendship, commerce, and navigation is a lengthy and comprehensive document which sets forth the basic framework of relations between the two contracting parties. Without such a treaty, American nationals and corporations doing business abroad are more or less at the mercy of foreign legislatures and local authorities. Such a treaty may take years to negotiate. It may remain in force a hundred years or more and, like the Constitution, must be interpreted to cover situations which could not be foreseen. New treaties will therefore have no immediate appreciable effect in the settlement of estates. It should be noted, however, that most-favored-nation provisions in older treaties, if not limited to trade and commerce, may enable aliens to take advantage of newer provisions.

In conclusion, it should be pointed out that the construction placed on a treaty provision by the Supreme Court of the United States is no longer necessarily the last word on the subject. The opinion of the Supreme Court is of course conclusive in the United States both with respect to individuals and the Executive Departments of the Government. However, treaties establish obligations between states, and their violation constitutes an international breach of such obligations. Formerly, a nation which believed a court decision in this country was contrary to a treaty between it and the United States was limited in its efforts to seek redress

⁸⁸ *In re Reiner's Estate*, 44 N.Y.S. (2d) 282 (1943); *In re Woelfinger's Estate*, 76 N.Y.S. (2d) 544 (1948).

⁸⁹ *Greene v. Frank*, 58 N.E. (2d) 465 (1944); *In re Carrington's Estate*, 81 N.Y.S. (2d) 77 (1948). See *In re Archdeacon's Estate*, 37 Atl. (2d) 34 (1944).

to diplomatic protests, to requests that the United States agree to submit the matter to arbitration, and to termination of the treaty if such representations proved fruitless. In 1946, however, the United States accepted the compulsory jurisdiction of the International Court of Justice with respect to "all legal disputes" between it and other countries, which had similarly accepted the jurisdiction of the Court, concerning, among other things, "the interpretation of a treaty." It is noted, however, that the declaration accepting that jurisdiction provided that it shall not apply to:

b. Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America.⁹⁰

On the assumption that the limitation last mentioned is not held to apply in a particular case, it is possible that a claim of an alien, involving an estate in the United States, which may be laid by his government on his behalf before the International Court of Justice would receive more favorable consideration than similar claims have sometimes received in American courts.

⁹⁰ 61 Stat. 1218 (1946); Statute of the International Court of Justice, 59 Stat. 1031 (1945).

NOTES ON LEGAL QUESTIONS CONCERNING THE UNITED NATIONS

BY YUEN-LI LIANG*

WHAT IS AN INTERNATIONAL CONFERENCE?

The General Assembly of the United Nations on December 3, 1949, adopted, by resolution, a set of rules for the calling of international conferences of states by the Economic and Social Council.¹ In addition to these rules, the General Assembly, in another resolution, requested the Secretary General to prepare, after consultation with the Economic and Social Council, draft rules for the calling of non-governmental conferences.² Both resolutions were intended to implement the power of the Economic and Social Council under the Charter to call, "in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence."³ During the elaboration of the above-mentioned rules, questions were raised as to whether the Council had the power to call non-governmental conferences as well as conferences of states, and whether it could call the latter without consulting the other Members of the United Nations than those represented in the Economic and Social Council. These questions hinged upon the meaning of the term "international conferences" as provided in Article 62, paragraph 4, of the Charter.

It may be recalled that the question of preparing rules for the calling by the Economic and Social Council of international conferences was first discussed in the General Assembly at its second session in 1947. Pending

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¹ General Assembly resolution 366 (IV). General Assembly, 4th Sess., Official Records, Resolutions, 1949, U.N. Doc. A/1251, pp. 64, 65.

² General Assembly resolution 367 (IV), *ibid.*, p. 65.

³ Article 62 of the Charter reads as follows:

"1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

"2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

"3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

"4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence."

the adoption of such rules, the General Assembly had previously adopted in 1946 a supplementary rule in its rules of procedure providing that the Economic and Social Council may, after due consultation with Members of the United Nations, call international conferences on any matter within its competence⁴ and invited the Secretary General to prepare, in consultation with the Economic and Social Council, draft rules for the calling of international conferences and to submit them to the General Assembly for its consideration.⁵ The Secretary General accordingly presented to the Economic and Social Council a set of draft rules for its consideration.⁶ The Council discussed these draft rules during its eighth session in 1949 and suggested certain modifications, to which the Secretary General agreed.⁷ The draft rules, as approved by the Economic and Social Council, were submitted to the General Assembly and were referred by the General Assembly to the Sixth Committee for consideration.⁸

The question of the interpretation of the term "international conference" arose mainly in the course of discussion of draft rule 1, which stipulated that the Economic and Social Council could at any time decide to call an international conference of states, experts and organizations on any matter within its competence, provided that, after consultation with the Secretary General and the appropriate specialized agencies, it was satisfied that the work to be done by the conference could not be done by any organ of the United Nations or by any specialized agency.

⁴ See Provisional Rules of Procedure of the General Assembly, U.N. Doc. A/71/Rev.1. See also Rules of Procedure of the General Assembly, U.N. Doc. A/520, Dec. 12, 1947, p. 29. The supplementary rule reads as follows:

"Pending the adoption under paragraph 4 of Article 62 of the Charter, of definite rules for the calling of international conferences, the Economic and Social Council may, after due consultation with Members of the United Nations, call international conferences in conformity with the spirit of Article 62 on any matter within the competence of the Council, including the following matters: international trade and employment; the equitable adjustment of prices on the international market; and health."

It may be noted that the Economic and Social Council has already called one non-governmental conference, the United Nations Scientific Conference on Conservation and Utilization of Resources, and three conferences of states, namely, the Conference of the World Health Organization, the International Conference on Trade and Employment and the United Nations Conference on Freedom of Information.

⁵ General Assembly resolution 173(II). General Assembly, 2nd Sess., Official Records, Resolutions, 1947, U.N. Doc. A/519, p. 104.

⁶ U.N. Doc. E/836.

⁷ Economic and Social Council, Official Records, 4th Year: 8th Sess., Feb. 7-March 18, 1949, pp. 403-405.

⁸ See Resolution 220(IV) of March 2, 1949, Economic and Social Council, Official Records, 4th Year: 8th Sess., Resolutions, p. 41. The draft rules were reproduced in U.N. Doc. A/943. The Sixth Committee of the General Assembly discussed the subject during thirteen meetings, which were held from November 9 to 21, 1949. See General Assembly, 4th Sess., Official Records, Sixth Committee, 1949, pp. 301-387 (hereinafter referred to as Official Records, Sixth Committee, 1949).

I. THE QUESTION WHETHER THE ECONOMIC AND SOCIAL COUNCIL HAS THE POWER TO CALL NON-GOVERNMENTAL CONFERENCES

From the outset, the provision of draft rule 1 which empowered the Economic and Social Council to call international conferences of experts and of organizations met with strong opposition from several delegations, for a variety of reasons. The representatives of Czechoslovakia, Egypt, France, Iran, Lebanon, Norway, the Union of Soviet Socialist Republics and Yugoslavia expressed doubts as to whether it was advisable to grant the Economic and Social Council such broad powers as were provided in the draft rules. The Soviet Union submitted an amendment to draft rule 1 which was calculated (a) to restrict the power of the Council to the calling of inter-state conferences, and (b) to empower the Council to call these conferences of states only after due consultation with the Members of the United Nations. In support of his position that the Economic and Social Council might call only conferences of states, the Soviet representative pointed out that the purpose of calling international conferences was to take concrete measures in the fields within the jurisdiction of the Council and, in particular, to prepare conventions which states may ultimately sign and ratify. A non-governmental conference or a conference of experts could not perform such functions.⁹

The representative of Poland took a similar view. He thought that draft rule 1 was, in reality, self-contradictory. On the one hand, he said, this rule stated that the Economic and Social Council could call international conferences, provided it was satisfied that the work to be done by the conferences could not "be done satisfactorily by any organ of the United Nations or by any specialized agency," and, on the other hand, it provided that the Council "may at any time decide to call . . . conferences of experts or non-governmental organizations." Thus, purely consultative organs might be called to carry out work which came within the competence of the United Nations itself.¹⁰

Those who were in favor of granting broad powers to the Council took the position that it was necessary to interpret the Charter in the light of need and common sense. The representatives of Brazil¹¹ and the Philippines¹² were of the opinion that, as the Council had to deal with many

⁹ Official Records, Sixth Committee, 1949, pp. 303, 304. The Soviet amendment reads as follows:

"The Council may, after due consultation with the Members of the United Nations, decide to call conferences of States on any matter within its competence in all cases in which, in its opinion, the work to be done by such conference cannot be done successfully by the main or subsidiary organs of the United Nations or by the specialized agencies." U.N. Doc. A/C.6/L.72.

¹⁰ Official Records, Sixth Committee, 1949, p. 308.

¹¹ *Ibid.*

¹² *Ibid.*, p. 315.

extremely varied and complex problems, it should be allowed the greatest possible latitude to apply whatever methods seemed most suitable in the solution of particular problems. The representative of Venezuela thought that it was hardly likely that, after having entrusted the Council with so many delicate tasks, the authors of the Charter would have wished to authorize them to convene conferences of states only, when by reason of its functions, the Council might find it advisable to call conferences of experts or others.¹³

1. *Interpretation of the term "international conferences" as used in Article 62 of the Charter*

It was felt in the Sixth Committee that in order to decide whether the Economic and Social Council had the power to call non-governmental conferences, the meaning of the expression "international conference" as used in the Charter had to be clarified.

Some members of the Sixth Committee who maintained that the expression "international conference," as used in paragraph 4 of Article 62 of the Charter, did not apply to international conferences of a non-governmental character, argued by reference to Article 62 as a whole. The representative of France pointed out that under paragraph 1 of that article, which authorized the Council to make or initiate studies or reports with respect to subjects within its competence, the Council could place questions on its agenda, study them, and then create organs for the purpose of doing preparatory work. This preparatory work might be done by experts or non-governmental organizations. He thought, therefore, that if the Council was permitted to call on the assistance of experts and organizations under paragraph 1 of Article 62, the expression "international conference" in paragraph 4 must mean conference of states.¹⁴ The representative of Norway was of the opinion that there was an unquestionable link between paragraphs 3 and 4 of Article 62. It would appear to have been the intention of the authors of the Charter, said the Norwegian representative, that if the Economic and Social Council was not itself able to draw up a draft convention on a question within its competence, it should be able to convene an international conference of states to draw up a draft convention.¹⁵

¹³ *Ibid.*, p. 314.

¹⁴ *Ibid.*, p. 304.

¹⁵ *Ibid.*, p. 310. It may be noted that reference was made in the Sixth Committee to the following passage of the report of the *rapporteur* of Committee II/3 of the San Francisco Conference:

"27. The Committee has recommended that the Council be given power to call conferences of members on matters falling within its scope, in accordance with the rules prescribed by the Organization (paragraph g). There was some discussion as to whether this should relate only to emergency situations or whether it should be more general. It was agreed that the general power was more desirable since it was felt that there

In opposition to the above view, some other representatives advocated a more liberal interpretation of the term "international conference." The representative of the United States reminded the Committee that there was no express definition of the term in Article 62 of the Charter, and therefore he urged the Committee to adopt a more liberal interpretation, stating that:

The Sixth Committee had just decided that the United Nations had the capacity to bring international claims; that had been done in the absence of any express provision in the Charter to that effect. A similar step could be taken at the present juncture.¹⁶

2. *Interpretation of the term "international conferences" in the light of other provisions in Chapter X of the Charter*

Referring to other provisions of Chapter X of the Charter, a number of representatives further argued that the authors of the Charter had deliberately used separate articles to deal with the calling of conferences (Article 62), the establishment of commissions of experts (Article 68), and the consultation of non-governmental organizations (Article 71). The representative of France pointed out that under Article 68 of the Charter the Economic and Social Council was authorized to set up commissions operating under its supervision,¹⁷ and that Article 71 provided for consultations between the Economic and Social Council and non-governmental organizations. He concluded, therefore, that if the authors of the Charter had considered it necessary to provide in a separate article for consultation between the Council and the non-governmental organizations, it proved that they had not thought such consultations were already permitted by the provisions of Article 62, paragraph 4. The representative of Yugoslavia stressed that under Article 71 the Council may make arrangements for consultation with national non-governmental organizations *only* after consultation with Members of the United Nations concerned.¹⁸ Relying on the same provision, the representative of Norway further argued that it would be illogical for the Council to enjoy greater powers when it was a question of inviting the same organizations to a conference at which they

should be both a flexible and a prompt method of calling conferences." [Documents of the United Nations Conference on International Organization, San Francisco, 1945, Vol. 10, p. 276. This report was approved by Commission II (Vol. 8, p. 86).]

¹⁶ Official Records, Sixth Committee, 1949, p. 304. With regard to capacity of U. N. to bring international claims, see Report of the Sixth Committee on "Reparation for Injuries Incurred in the Service of the United Nations," U.N. Docs. A/1101 and A/1101/Corr.1.

¹⁷ Official Records, Sixth Committee, 1949, p. 304. Article 68 of the Charter reads as follows: "The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions."

¹⁸ *Ibid.*, pp. 309, 310.

would be placed on the same footing as states and where, namely, they would be able not only to give opinions but also to take part in the decisions of the conferences.¹⁹

On the other hand, some other representatives urged that, in view of the broad powers conferred on the Council by Chapter X of the Charter of the United Nations, it was logical to interpret the term "international conference" to include conferences of experts or non-governmental organizations. With reference to consultations with non-governmental organizations under Article 71, the representative of the United States believed that there was no reason why the Council, after consulting with non-governmental organizations, should not invite them to attend a conference at which some action directly concerning them might be taken. Moreover, Article 62, paragraph 1, merely authorized the initiation of studies and reports. If, after such studies and reports had been prepared, the Council found it necessary to invite the experts who had prepared them to a conference, logically it should be able to do so.²⁰

The representative of The Netherlands drew the Committee's attention to the fact that in Chapter X of the Charter, which was devoted to the Economic and Social Council, Article 62 came under the sub-heading "Functions and Powers," whereas Article 68 and following came under the sub-heading "Procedure." In view of that fact, he also assumed that Article 68, together with the remaining articles under the sub-heading "Procedure," did not grant the Council any powers distinct from those conferred on it by Article 62. They only indicated the methods by which the Council could exercise the functions enumerated in Article 62. It was not correct, therefore, to say that Article 71, in particular, restricted the Economic and Social Council's power to convene international conferences. Article 71 dealt with the arrangements the Council could make for consulting non-governmental organizations which were concerned with matters within its competence. The convening of an international conference in which those organizations would take part did not come within the framework of the arrangements provided for in Article 71, since such a conference could not be linked to consultation with non-governmental organizations.²¹

As a compromise between the two opposing schools of thought, the representative of Argentina submitted an amendment to draft rule 1 to the effect that the Economic and Social Council could at any time decide to call an international conference of states "and, after consultation with Member States, conferences of experts or non-governmental organizations."²² This compromise amendment was subsequently withdrawn.²³

¹⁹ *Ibid.*, p. 310.

²⁰ *Ibid.*, p. 304.

²¹ *Ibid.*, p. 311.

²² U.N. Doc. A/C.6/L.76.

²³ Official Records, Sixth Committee, 1949, p. 322. The Chairman, however, stated that the competence of the Economic and Social Council was not involved in that vote.

after the Committee had decided that the rules to be drafted by the Sixth Committee should be confined to the calling of inter-state conferences.²⁴ In view of this decision, the part of the Soviet amendment designed to restrict the power of the Council to the calling of conferences of states only was not voted upon.

II. THE QUESTION WHETHER CONSULTATIONS WITH MEMBER STATES ARE NECESSARY PRIOR TO THE CALLING OF CONFERENCES OF STATES

Immediately after it took the first decision, namely, to draft rules for the calling of conferences of states, the Sixth Committee took up the amendment previously submitted by the Soviet Delegation to draft rule 1, which suggested that the Economic and Social Council could call conferences of states only "after due consultation with the Members of the United Nations." In introducing this amendment, the Soviet representative pointed out that the calling of international conferences entailed a considerable sacrifice in time and money for Member States, and consequently only after a substantial number of states had recognized the necessity, should such a conference be called. Furthermore, since the Council, under Article 62(4), could call international conferences only "in accordance with the rules prescribed by the United Nations," the conclusion must be that the authors of the Charter had not wished to give to the Council discretionary powers to call international conferences.²⁵ The Soviet representative stated, however, that his amendment did not specify how many favorable opinions would be required before a conference of states could be called, but that such consultations were useful as they would enable the Council to make its decision in full knowledge of the facts.²⁶ The representatives of Pakistan and Peru shared the view of the Soviet representative.²⁷

On the other hand, the representatives of Brazil, China, Colombia, Cuba, the United States and Venezuela were of the opinion that the organs of the United Nations should enjoy certain independence of action, and that in matters falling within their competence they should be free to decide what measures should be taken in the Organization's interest.²⁸

The Sixth Committee rejected the Soviet amendment by 25 votes to 15, with 15 abstentions.²⁹

III. DECISION OF THE GENERAL ASSEMBLY IN CONNECTION WITH RULES FOR THE CALLING OF INTERNATIONAL CONFERENCES OF STATES

In the course of the discussion the representative of Belgium, supported by the representative of Egypt, suggested that it might be advisable to refer the matter to the Economic and Social Council once again, pointing out the legal difficulties raised by the existing draft rules and advising it

²⁴ Official Records, Sixth Committee, 1949, p. 318.

²⁵ *Ibid.*, p. 311.

²⁶ *Ibid.*, pp. 324-325.

²⁷ *Ibid.*, p. 323.

²⁸ *Ibid.*, pp. 322, 323 and 324-326.

²⁹ *Ibid.*, p. 326.

that it would be desirable to amend them in such a way as to provide separate rules for the calling of conferences of states, conferences of non-governmental organizations and conferences of experts.³⁰ The representative of the Secretary General suggested that the Sixth Committee might decide to restrict the scope of the draft rules to conferences of states, and might indicate in its report to the General Assembly that the omission of any reference to conferences of experts and non-governmental organizations did not prejudice any decision which might later be reached in regard to such conferences.³¹ The representative of Iran accepted this suggestion and moved that a preliminary vote be taken to decide whether the draft rules should include provisions for the calling of international conferences of states only, or also conferences of experts or non-governmental organizations.³² The Sixth Committee, at its 189th meeting, decided that the draft rules would be confined to calling of inter-state conferences.³³ The rules as a whole were adopted by 32 votes in favor, none against, with seven abstentions.³⁴

The *Rapporteur* of the Sixth Committee in his report to the General Assembly said:

The Committee discussed extensively the interpretation of the expression "international conferences" as used in paragraph 4 of Article 62 of the Charter, and in particular whether this expression could be applied to international conferences of a non-governmental character. Following this discussion, the Committee decided, by 25 votes to 22, with 2 abstentions, that the present rules should be confined to the calling of international conferences of States. It was understood, however, that this decision carried with it no implication that paragraph 4 of Article 62 was necessarily to be given a restricted meaning by the Economic and Social Council. In particular, it was understood that the decision to limit the present rules to conferences of States did not mean that the Council would be barred from calling conferences of non-governmental organizations and experts. However, it was felt that the rules for the calling of such international non-governmental conferences required more detailed study which, because of lack of time, could not be undertaken during the present session of the General Assembly.³⁵

The General Assembly adopted the draft rules at its 266th plenary meeting on December 3, 1949.³⁶

³⁰ *Ibid.*, pp. 307, 308, 312.

³¹ *Ibid.*, pp. 310, 311.

³² *Ibid.*, p. 317.

³³ *Ibid.*, p. 318. The representatives of Burma, Cuba, Ecuador and New Zealand declared that they had voted against the proposals because they were of the opinion that the term "international conference" in the context of Art. 62 should be interpreted to include conferences of non-governmental organizations and experts.

³⁴ *Ibid.*, p. 384.

³⁵ U.N. Doc. A/1165, p. 1.

³⁶ The draft rules were adopted by 39 votes to none, with 6 abstentions. U.N. Doc. A/SR.266, p. 5.

IV. DECISION OF THE GENERAL ASSEMBLY CONCERNING THE DRAFT RULES FOR THE CALLING OF NON-GOVERNMENTAL ORGANIZATIONS

During the discussions on the rules for calling international conferences of states, the Sixth Committee considered a proposal by Israel to abrogate the supplementary rule of procedure of the General Assembly on the calling of international conferences by the Economic and Social Council.³⁷ Some representatives, however, expressed objections to the proposal. It was asserted that the Committee's decision to limit the rules to the calling of conferences of states made it desirable that the supplementary rule should be retained and that the General Assembly had already, in accordance with this rule, adopted a resolution instructing the Secretary General to call a technical assistance conference.³⁸ In view of these objections the representative of Israel withdrew his proposal.

The questions of the powers of the Economic and Social Council and of the meaning of the term "international conference" were again considered in connection with a draft resolution introduced by the representative of Argentina, which requested the Secretary General to prepare, after consultation with the Economic and Social Council, draft rules for the calling of non-governmental conferences, with a view to their study by the General Assembly.³⁹

Those who were against the Argentine draft resolution expressed the view that the Economic and Social Council had the power to call non-governmental conferences under the provisions of Articles 68 and 71 of the Charter, but not under Article 62(4);⁴⁰ while those in favor maintained that Article 62 was broad enough to cover such conferences, and recalled that the previous decision of the Sixth Committee to restrict the draft rules to conferences of states had not prejudged the position of the Committee as to the power of the Council to call non-governmental conferences.⁴¹

At its 199th meeting on November 21, 1949, the Sixth Committee adopted, with minor drafting changes, the Argentine draft resolution, and recommended it to the General Assembly for adoption.⁴² The draft resolution was adopted by the General Assembly on December 3, 1949.⁴³

³⁷ U.N. Doc. A/C.6/L.73. For text of supplementary rule, see note 4, *supra*.

³⁸ Official Records, Sixth Committee, 1949, pp. 383, 384. The reference was to resolution 304(IV) of Nov. 16, 1949. General Assembly, Official Records, Resolutions, 1949, p. 27.

³⁹ U.N. Doc. A/C.6/L.77.

⁴⁰ See the arguments of the representative of France, Official Records, Sixth Committee, 1949, p. 386; U.S.S.R., *ibid.*

⁴¹ See the argument of the representative of Argentina, Official Records, Sixth Committee, 1949, pp. 384, 385; Chile, *ibid.*, p. 385; Cuba, *ibid.*, p. 386; Philippines, *ibid.*; United States, *ibid.*

⁴² Official Records, Sixth Committee, 1949, p. 387.

⁴³ This resolution was adopted by a vote of 40 to 8, with 6 abstentions. U.N. Doc. A/SR.266, p. 5.

THE USE OF THE TERM "ACCEPTANCE" IN UNITED NATIONS TREATY PRACTICE

One of the interesting developments associated with the United Nations treaty practice has been the introduction into multipartite treaties of the term "acceptance."

It is believed that the first use of this term is to be found in the Constitution of the Food and Agriculture Organization prepared between July, 1943, and August, 1944, by the Interim Commission established by the United Nations Conference on Food and Agriculture, which met at Hot Springs in May, 1943. Article XXI of the Constitution stipulated for collective signature after individual "acceptance."¹ This collective signature took place on October 16, 1945, at a session of the Interim Commission and the organization officially came into being on that date. The term "acceptance" was also used in Article VI of the International Air Services Transit Agreement, Article VIII of the International Air Transport Agreement, and in Article XVII of the Interim Agreement on ICAO, all signed at Chicago on December 7, 1944. Under the three articles, the delegates to the International Civil Aviation Conference signed the agreements with the understanding that the Government of the United States should be informed by each of the governments on whose behalf the agreements had been signed whether signature on its behalf should constitute an acceptance of the agreements by that government and an obligation binding upon it. Similarly, the Constitution of the United Nations Educational, Scientific and Cultural Organization, signed on November 16, 1945, provides in Article XV that:

1. This Constitution shall be subject to acceptance. . . .
2. . . . Signature may take place either before or after the deposit of the instrument of acceptance. No acceptance shall be valid unless preceded or followed by signature.

¹ Article XXI reads as follows:

"1. This Constitution shall be open to acceptance by the nations specified in Annex I.

"2. The instruments of acceptance shall be transmitted by each government to the United Nations Interim Commission on Food and Agriculture, which shall notify their receipt to the governments of the nations specified in Annex I. Acceptance may be notified to the Interim Commission through a diplomatic representative, in which case the instrument of acceptance must be transmitted to the Commission as soon as possible thereafter.

"3. Upon the receipt by the Interim Commission of twenty notifications of acceptance the Interim Commission shall arrange for this Constitution to be signed in a single copy by the diplomatic representatives, duly authorized thereto, of the nations who shall have notified their acceptance, and upon being so signed on behalf of not less than twenty of the nations specified in Annex I this Constitution shall come into force immediately.

"4. Acceptance the notification of which is received after the entry into force of this Constitution shall become effective upon receipt by the Interim Commission or the Organization."

Another early use of the "acceptance" procedure is found in the Bretton Woods Agreements drawn up in July, 1944, and signed on December 27, 1945; namely, the Articles of Agreement of the International Monetary Fund (Article XX, Section 2), and the Articles of Agreement of the International Bank for Reconstruction and Development (Article XI, Section 2). The relevant sections, which are identical, read as follows:

(a) Each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement.

(b) Each government shall become a member . . . as from the date of the deposit on its behalf of the instrument referred to in (a) above, except that no government shall become a member before this Agreement enters into force under Section 1 of this Article.

Under other provisions in the agreements, it was necessary for these agreements to enter into force by a specified date by final action taken by the states representing specified percentages of quotas or minimum contributions. The need, therefore, arose for a flexible procedure in order that as many states as possible could, in accordance with their respective constitutional requirements, take the necessary final action before the specified date. The use of the "acceptance" procedure afforded the requisite elasticity. The United States, for instance, after the requisite legislative authorization was obtained from the Congress, including financial appropriations necessary for fulfilling the obligations of membership, was able to become a party to each of these agreements by means of an instrument of acceptance, signed by the President, setting forth that the United States accepted the agreement "in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under the agreement." In other words, it was thus made possible for the United States, in accordance with its municipal law, to become bound by these agreements without the need of following the procedure, including advice and consent of the Senate to ratification, reserved in the United States for treaties in the constitutional sense.

Following upon this introduction, the use of the term "acceptance" became fairly common,² and it was inserted in a number of multipartite con-

² For example, Art. 6 of the Instrument for the Amendment of the Constitution of the International Labor Organization signed Nov. 7, 1945, provides for "acceptances" as alternative to "ratifications" (U. N. Treaty Series, Vol. 2, p. 22); Art. V. of the Agreement for the establishment of a Provisional Maritime Consultative Council, adopted Oct. 30, 1946 (*loc. cit.*, Vol. 11, p. 112); Art. XXVI of the General Agreement on Tariffs and Trade, adopted Oct. 30, 1947, provides for its acceptance by governments signatory to the Final Act of the Second Session of the Preparatory Committee of the U.N. Conference on Trade and Employment; Art. 103 of the Havana Charter for an International Trade Organization, drawn up by the U.N. Conference

ventions and agreements which were adopted by the General Assembly or concluded under the auspices of the United Nations. It was contained in the following formula, which has acquired the nature of a standard clause providing:

States may become parties to an instrument by:

- (a) Signature without reservation as to acceptance;
- (b) Signature with reservation as to acceptance, followed by acceptance; and
- (c) Acceptance;³

and that "Acceptance shall be effected by the deposit of a formal instrument with the Secretary General of the United Nations."

This formula is in essence an elaboration in a different guise of the classical modes whereby states become bound by multipartite instruments. It enables any government, which does not require further constitutional authorization to bring the instrument into force, to become a party upon signature. It may be said thus to enhance the value of signature alone as a method of creating a binding obligation. Furthermore, this formula, by avoiding the classical terms of ratification and accession implied in formal treaty procedure, has permitted states to become bound by multipartite instruments by the most appropriate or convenient procedure in accordance with their respective constitutional processes. The formula has also permitted the Secretary General of the United Nations as depositary of a multipartite instrument to regard a formal written declaration emanating from the head of a government or from a minister of foreign affairs as constituting the "acceptance" of the said instrument.⁴

on Trade and Employment in March, 1948, provides that "The government of each State accepting this Charter shall deposit an instrument of acceptance with the Secretary General of the United Nations. . . ." The term "acceptance" is, however, not used in the Convention on International Civil Aviation (1944), in the International Telecommunications Convention (1947), or in the Convention of the World Meteorological Organization (1947), all of which provide for signature and ratification. The revised Postal Union Convention (1948) provides for "new adhesions" (Art. 3).

³ Examples of this formula may be found in the following instruments: Art. IV of the Protocol Amending the International Convention relating to Economic Statistics (1928), signed at Paris Dec. 9, 1948 (U.N. Treaty Series, Vol. 20, p. 229); Art. XV(b) of the Convention of the International Institute of the Hylean Amazon, adopted at Iquito, Peru, May 10, 1948; Art. 57 of the Convention on the Inter-Governmental Maritime Consultative Organization, signed at Geneva March 6, 1948; Art. 4 of the Protocol Amending the Agreement for the Suppression of the Circulation of Obscene Publications, adopted by the General Assembly Dec. 3, 1948, and signed at Lake Success May 4, 1949; Art. 4 of the Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, adopted by the General Assembly Dec. 3, 1948, and signed at Lake Success May 4, 1949.

⁴ See the statement by the Assistant Secretary General in charge of the Legal Department, General Assembly, 3rd Sess., Pt. I, Official Records, Sixth Committee, 90th meeting, p. 284.

Acceptance not preceded by signature such as is referred to under subparagraph (c) of the above-quoted formula corresponds to the recognized meaning of "accession,"⁵ namely, an act by which the provisions of the treaty are formally accepted by a non-signatory state. In each case what is involved is a single act. "Acceptance" in this sense as an alternative method to that of signature without reservation as to acceptance or to that of signature to be followed by acceptance, places a state availing itself of this method on the same level as those signatories which have become parties to the treaty, thereby blurring the traditional distinction between signatory and acceding states.⁶ In other words, for the purpose of this formula, such signatory states and the accepting (acceding) states come under one single category, namely, "parties to the instrument."

Under subparagraphs (a) and (b), however, "acceptance" is equivalent to "ratification" in most cases, but it is not necessarily confined to "ratification" in the sense of municipal law. Where a signatory state reserves its position as to acceptance, it is free subsequently either to adopt the procedure of ratification as provided in its municipal law or to take whatever other legislative or executive measures it may deem more expedient within the purview of its own national constitutional processes.⁷

It is perhaps for the purpose of avoiding the dual meaning of the term "acceptance" that a variation of the formula was inserted in some multi-

⁵ No distinction is made here between "accession" and "adhesion" or "adherence." The term as used does not apply to "accession *ad referendum*" which was employed to a certain extent in multipartite treaties under the League of Nations. See Comment on Article 12, Harvard Research Draft Convention on the Law of Treaties, this JOURNAL, Supp., Vol. 29 (1935), p. 812.

⁶ The Harvard Research draft (*op. cit.*, p. 812) confines the use of the term "accession" to formal acceptance "by a State on behalf of which a treaty has not been signed or ratified." The practice of providing for accession by all states instead of the traditional procedure of signature and ratification by the original parties on the one hand, and of accession by non-signatory states on the other, began with the General Act for the Pacific Settlement of International Disputes, adopted on Sept. 26, 1928, by the League Assembly. McNair in *Law of Treaties*, p. 102, described this procedure as "an unusual employment of the procedure and terminology of accession." For summary of the discussion in the League Assembly, see Harvard Research, *loc. cit.*, pp. 816 and 825. The Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly on Feb. 13, 1946, and the Convention on the Privileges and Immunities of the Specialized Agencies adopted on Nov. 21, 1947, followed the same practice.

⁷ Cf. remarks on the standard formula made by Dr. Durward V. Sandifer, U. S. representative to the International Health Conference, at its 13th plenary meeting July 17, 1946: "The United States is particularly interested in that procedure. . . . We tried very carefully to draft this statement here so that the word 'acceptance' would be broader than its connotation and would include ratification, but would also make possible a less formal instrument of approval. If you use the word 'ratification,' the difficulty is that it has a very definite significance in international law, and it would require a formal instrument of ratification, which would affect the constitutional procedures of approval in a number of countries." U.N. Doc. E/H/P.V.13; summarized in World Health Organization, Official Records, No. 2, p. 75.

partite instruments concluded under the auspices of the United Nations. This variation provides:

States may become parties to an instrument by:

- (a) Signature without reservation as to approval;
- (b) Signature subject to approval followed by acceptance;
- (c) Acceptance.⁸

It will be noticed that the variation from the standard formula consists in the substitution of the term "approval" for the term "acceptance" in subparagraph (a) and in the first part of subparagraph (b). The difference between a stipulation for "signature subject to approval followed by acceptance" and one for "signature with reservation as to acceptance followed by acceptance" would appear at first sight to be mainly one of terminology. The impelling reasons for making the variation do not seem to be very clear. The published records of the conferences which adopted this variation do not contain adequate comments that are helpful.⁹ A possible ground for the distinction is that "approval" may have been used to indicate the approbation, by the process of municipal law, of the terms of a treaty, as contradistinguished from "acceptance," which is used to indicate the formal act evidencing the actual acceptance of the treaty by the state.¹⁰

⁸ Examples of this variation may be found in the following instruments: Art. 79 of the Constitution of the World Health Organization, signed at New York July 22, 1946 (U.N. Treaty Series, Vol. 14, p. 185); Art. 1 of the Constitution of the International Refugee Organization, opened for signature Dec. 15, 1946 (*loc. cit.*, Vol. 18, p. 3); Art. 6 of the Protocol concerning the International Office of Public Health, signed at New York July 22, 1946 (*loc. cit.*, Vol. 9, p. 3); Art. VI of the Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, adopted by the General Assembly Oct. 8, 1948, signed at Lake Success Dec. 11, 1946.

⁹ For example, at the International Health Conference, 1946, which adopted the Constitution of the World Health Organization, the draft drawn up by the Drafting Subcommittee of the Committee on Legal Questions followed the standard formula. (See U.N. Doc. E/H/L/W.25, July 10, 1946.) This standard formula was approved by the full Committee at its 18th meeting on July 15, 1946. (See U.N. Doc. E/H/L/W.30.) It was also adopted by the Conference at the 13th plenary meeting on July 17, 1946. (See World Health Organization, Official Records, No. 2, pp. 74-76.) However, in the final text of the Constitution which was put to the vote and adopted at the 17th plenary meeting on July 22, 1946, the variant formula was introduced and the word "acceptance" in the two places had been substituted by "approval." (*Ibid.*, p. 93, and Art. 79 on p. 109; also U.N. Doc. E/H/P.V.17.) How and when the variation from the original formula was brought about, available official records of the Conference do not show. It may be noted that the Conference had constituted a Central Drafting Committee which was advised by a "legal panel" and which held a series of meetings from July 13 to 21, 1946. (See U.N. Doc. E/H/P.V.17, p. 2.) Whether the variation was introduced by this Committee, the records do not reveal.

¹⁰ Cf. the comment on Art. 12(a) of the Harvard Research Draft Convention on the Law of Treaties, *loc. cit.*, p. 822, concerning the suggested distinction between "adhesion" (accession *ad referendum*) and "accession" (accession properly speaking).

It may be pertinent now to refer to the discussions which took place in the Sixth Committee of the General Assembly during the first part of its Third Session (1948) with respect to the meaning and implications of the term "acceptance." The question was raised during the drafting of the Protocol Amending the International Convention relating to Economic Statistics.¹¹ The representative of Luxembourg asked what was the difference between the terms "acceptance" and "ratification." At a subsequent meeting Dr. Ivan Kerno, Assistant Secretary General in charge of the Legal Department, referred to the efforts initiated by the League of Nations to speed up the coming into force of international conventions. He stated that a great many conventions and protocols framed since the creation of the United Nations had, in fact, in that respect adopted a simplified procedure, whereby a state could become a party to a convention by signing it without reservation as to acceptance, or, having signed it subject to acceptance, by accepting it later, or, finally, by accepting it. The notion of acceptance covered both that of ratification and that of accession. It was, however, broader and more flexible, for it permitted the preparation of an instrument which did not need to be as formal in character as it had to be for purposes of ratification or accession.¹²

The question was then raised of the difference between the terms "acceptance" and "approval."¹³ The representative of Belgium (Dr. Georges Kaeckenbeeck) said that the term "approval" was ambiguous and was contrary to the traditions of international law. In his opinion it created a confusion between the internal and external process of ratification. Ratification after signature was well established in international law, whereas approval depended exclusively upon the parliamentary and constitutional law of the various states. The formula containing the term "approval" which had been adopted in order to simplify matters for certain states had complicated them for others. He therefore preferred that the term "approval" should be replaced by the term "acceptance." Although the latter was a new term introduced into international vocabulary by the United Nations, its meaning was already clearly established and it corresponded in practice to the notion of ratification.

The representative of Venezuela (Dr. Pérez Perozo), who was of the same opinion, considered "acceptance" was preferable to "ratification," as it was a more comprehensive term and one which enabled each state to apply its own constitutional procedure.¹⁴

The question of the use of the term "acceptance" as contained in the standard formula was again raised during the discussion on the Draft Convention for the Suppression of the Traffic in Persons and of the Ex-

¹¹ General Assembly, 3rd Sess., Pt. I, Official Records, Sixth Committee, 88th meeting, p. 261.

¹² *Ibid.*, 90th meeting, p. 284.

¹³ *Ibid.*, 91st meeting, p. 296.

¹⁴ *Ibid.*, p. 297.

exploitation of the Prostitution of Others in the Sixth Committee of the General Assembly during its Fourth Session (1949).¹⁵ The relevant article which, amongst others of the draft convention, had been referred to the Sixth Committee by the Third Committee which had drafted them, was framed in the terms of the standard formula.¹⁶ The representative of France (Madame Paul Bastid) introduced an amendment which provided for signature and ratification rather than acceptance as contained in the standard formula.¹⁷ She preferred the use of the terms "signature, ratification and accession" because this would be in conformity with the practice of the United Nations in the two most recent conventions approved by the General Assembly—the Convention on the Prevention and Punishment of the Crime of Genocide, approved on December 9, 1948, and the Draft Convention on the International Transmission of News and the Right of Correction, approved on May 13, 1949¹⁸—as well as with the classical terminology.¹⁹

Madame Bastid added that since the term "acceptance" as contained in the standard formula had not been used in the most recent conventions approved by the General Assembly, it did not appear logical to revert to a system already abandoned. An additional reason for the amendment was that the constitutional processes by which ratification was effected were usually performed by the parliament of a state, and as the draft convention in question might make it necessary for a number of states to enact new legislation, it was highly desirable that the parliaments which would have to pass that legislation should first approve the convention.

The representative of the United Kingdom (Mr. G. G. Fitzmaurice), supporting the French amendment, said that in his opinion most states would find the method of signature followed by ratification the most suitable, although he acknowledged that it was true that the use of the term "acceptance" was more flexible.²⁰

After a further exchange of views in the Committee, the Chairman asked the Committee to vote on the following question:

Does the Sixth Committee approve the procedure of signature followed by ratification in preference to the procedure described in the draft proposed by the Third Committee?

¹⁵ General Assembly, 4th Sess., Official Records, Sixth Committee, 200th meeting, p. 398.

¹⁶ U.N. Doc. A/C.6/L.66.

¹⁷ U.N. Doc. A/C.6/L.94.

¹⁸ The General Assembly decided that this draft convention should not be open to signature until the work on the Draft Convention on Freedom of Information was completed. See Resolutions 277(IV) and 313(IV).

¹⁹ It may be added that "acceptance" was not used in the Convention on Road Traffic drafted by the United Nations Conference on Road and Motor Transport, Sept. 16, 1949 (Doc. E/Conf.8/47).

²⁰ General Assembly, 4th Sess., Official Records, Sixth Committee, 201st meeting, p. 400.

The Committee gave an affirmative answer to this question by 33 votes to 0, with 4 abstentions.²¹

During the aforementioned discussion in the Sixth Committee, the representative of Australia (Mr. Alan Renouf) said that he thought it would be extremely helpful if the final clauses of the various conventions prepared under the auspices of the United Nations were drafted in a uniform manner. In reply to this point, the Assistant Secretary General in charge of the Legal Department said that the Secretariat was concerned with the question only insofar as the Secretary General was instituted the depositary of multipartite instruments, but that it had already been considered in connection with the preparatory work of the International Law Commission. The Commission had chosen the topics it considered to be necessary or desirable for codification, and, among others, the law of treaties had received priority. The matter of final clauses of multipartite instruments would obviously be given an important place in any such study. He agreed, moreover, that it would be useful to establish a uniform practice and said that, although the formula which provided for signature with reservation as to acceptance might seem rather unusual, it doubtless had certain advantages. Finally, he emphasized that the Secretariat had no preference for one method or the other, but that a decision upon the matter would be welcome. The Sixth Committee then proceeded, as indicated above, to vote unanimously against the use of the term "acceptance" in the aforementioned convention.

²¹ *Ibid.*

EDITORIAL COMMENT

CLOSURE OF PORTS BY THE CHINESE NATIONALIST GOVERNMENT

By a note of June 20, 1949, the Chinese Nationalist Government advised the United States that certain specified regions and ports on the Chinese coast, including the port of Shanghai, in the hands of Communists, "shall be temporarily closed and entry therein of foreign vessels shall be strictly forbidden"; and beginning at midnight, June 25, "prompt action shall be taken to prevent violation of this decision by foreign vessels," which shall bear responsibility for violations (Department of State Press Release 483, June 23, 1949). On June 28, the Secretary of State replied:

The United States Government cannot admit the legality of any action on the part of the Chinese government in declaring such ports and the territorial waters adjacent thereto, closed to foreign vessels unless the Chinese government declares and maintains an effective blockade of them. In taking this position the United States government has been guided by numerous precedents in international law with which the Chinese government is doubtless familiar and has noted that the ports referred to are not under the actual control of the Chinese government. (Press Release 499, June 29, 1949.)

The Chinese Government rejoined on June 30, that it

deems it within the sovereign right of a state to declare open or closed any part of its territory whenever conditions necessitate. In fact the Chinese government has exercised in the past on more than one occasion the right to close some of its ports, and no question of legality has been raised by any government, including that of the United States. Port Dairen, for instance, was declared closed at a time when it was not under the actual control of the Chinese government.

This closure is of a "similar nature and is therefore enforceable independent of a declaration of blockade, which has never been and is not under the contemplation of the Chinese government."

American shipping circles were immediately notified of the port closure order and warned that any American ships would enter on their own responsibility.

The Isbrandtsen Company, owner of the ships mentioned below, reports that the *Flying Clipper* and the *Flying Independence* on September 18, 1949, entered Shanghai after exchanging signals with a Nationalist warship, but on leaving were detained on the high seas for several days under threat of gunfire. The *Flying Cloud* likewise entered Shanghai on October 30, 1949, and on leaving was fired on without warning. On November 29,

the *Sir John Franklin* was fired on without warning on entering¹ but left without incident. The *Flying Arrow* on January 9, 1950, was likewise fired on before entering while some twenty miles at sea. "The attacks all took place outside territorial waters." (Company statement, *New York Times*, Jan. 24, 1950. See also opinions of James Ryan, Company's counsel, *New York Times*, Nov. 25, Dec. 30, 1949.)

These attacks brought forth diplomatic protests by the United States. The Secretary of State in a press conference on November 30, 1949, reiterated that the United States from the outset had refused to accept the port closure as a legal blockade and that American shipping had been notified that it would enter on its own responsibility. He added that press reports of Nationalist naval and air activity made the Shanghai approaches a hazardous area, that a shipping company (Isbrandtsen Company) had requested naval escort, which was refused, as it was "not this Government's policy to convoy American shipping through the so-called blockade." The Department immediately dispatched a note to the Nationalist Government (delivered December 2) expressing "serious concern" with regard to the attack on the *Sir John Franklin* which was described in some detail. The note continued:

As informed on June 29 last, "in the absence of a declaration and mention of an effective blockade, the United States government cannot admit the legality of the action on the part of the Chinese government in declaring certain Chinese ports and territorial waters adjacent thereto, not actually under control of the Chinese government, closed to foreign vessels." Indiscriminately and wantonly firing on American ships and thus endangering American lives "was unjustifiable and contrary to the law and practice of nations. Accordingly the United States government holds the Chinese Nationalist government fully responsible for any losses sustained by American nationals as a result of these reckless acts."

The note closed with a request that orders be issued to "preclude the possibility of any further incident of this nature." (Press Release 948, December 3, 1949.)

It appears that some of the firing occurred outside territorial waters, that firing began without warning, although the vessel had agreed to be boarded and that when she stopped, firing was continued. This was apparently the basis for holding the Chinese Government responsible for the losses sustained.

Apparently no direct answer was given to this note. It was said to have been rejected orally by the Chinese Foreign Minister to the United States Chargé with the remark that the Isbrandtsen ships must suffer the consequences if they violate the closure order (*New York Times*, Dec. 7, 1949).

Nevertheless, in a note of December 12, 1949, the Chinese Government

¹ Reported by United States Consul as hit twelve times (*New York Times*, Nov. 28, 1949).

again repeated its closure notice of June 20, and said, in order to avoid incidents which have occurred to vessels ignoring this order,

the Chinese government has now decided that any American registered vessels now remaining in the above mentioned territorial waters and ports . . . shall be instructed promptly to leave . . . within a week of grace beginning December 12, 1949.

Safe conduct outward will be afforded. In order to tighten this order,

the Chinese government will take such effective orders as may be deemed necessary. Any foreign vessels which in violation of this order shall hit any mine, sustain any damage or losses, or encounter any risk, obviously must assume responsibility themselves.

The note asks that the above be promptly notified to American shipping circles (Press Release 990, December 19, 1949).

Thereupon the Department of State on December 17, 1949, warned all shipping:

that the port of Shanghai and its approaches constitute a zone of danger and the conditions in it are such as to render this area extremely hazardous to shipping. In view of this situation it is obvious that American lives and property should not be exposed to such risks and all masters of American flag ships are warned accordingly. (Press Release 986, December 17, 1949.)

This warning was also handed directly to the *Flying Arrow* at Okinawa on December 18 and again in Korea on December 20. It also contained a further notice that "the Coast-Guard has advised that violation of the warning will render licenses of masters of United States flag vessels liable to action under R.S. 4450." (Press Release 1001, Dec. 23, 1949.) This law refers to suspension or revocation of licenses for masters' misbehavior, negligence or other causes set forth in the law. On December 29, the Department warned American shipping and shipmasters that it was "informed by the Chinese government that the approaches to the Yangtze River and Shanghai had been mined within Chinese territorial waters," without any channel left open for ingress or egress (Press Release 1016, December 29).

Despite these warnings, it was reported that the *Flying Arrow* sailed from Hong Kong for Shanghai and on approaching the mouth of the Yangtze River on January 9, 1950, was halted outside territorial waters by gunfire of a Chinese naval vessel. She was badly damaged, set on fire and rendered unseaworthy by thirty to forty shells. The Chinese Navy alleged she was fired on to prevent her entry into the mine-field at the mouth of the Yangtze River, after she had ignored orders and warning shots to halt. The United States Navy Department ordered two destroyers to aid the disabled ship and "assist her to reach any port except Shanghai which is considered by this government to be a dangerous zone." The master estimated they were 22 miles offshore when the attack began.

After repairing her wounds United States destroyers escorted her en route to Tsingtao (*New York Times*, Jan. 10, 11, 13, 1950). The United States held the "Chinese Government fully responsible" for this "violation of American rights on the high seas" and demanded that "such lawless attacks" be not repeated (Press Release 182, Feb. 27, 1950).

From this summary of the pertinent facts it is clear that the port closure order was not and was not intended to be a "declaration of blockade, which has never been and is not under the contemplation of the Chinese government." The situation, therefore, is that of the legitimate Government of China (now a refugee government on the Island of Formosa) attempting to close by decree certain ports in the possession of Communist rebels who were in control of most of the mainland. This situation presents in sharp focus the not unfamiliar difficulties and problems which arise when insurgency intervenes to disturb the normal relations of states. Insurgency is said to denote "the existence of a state of domestic hostilities without recognition of belligerency."²

The legitimate government has a conceded right and duty as a matter of self-defense and preservation to put down an uprising in its territory. At the same time the insurgents have an inherent right to resort to revolution for political purposes with a view to changing undesirable conditions alleged to flow from the administration of the existing government. If they succeed they become the responsible government of the nation liable for damages due to many of their acts from the beginning. If they fail, the legitimate government remains the responsible government and is presumptively liable only for the acts of the insurgents which it neglected to use diligence to prevent. Third nations are bystanders to the conflict and their attitude is largely one of policy accordingly as their interests may be more or less interfered with in the course of the contest. The legitimate government has a right to use all proper means to restore order and peace within its territory, and it is difficult in principle to see why it should not by decree prevent trade with the rebels in order to suppress the rebellion against its authority and very existence, without granting them equality of status with itself by recognizing them as a belligerent, and proclaiming a blockade of their ports. Such a blockade, if effectively maintained, is usually though not always recognized by third Powers under the penalties and safeguards of the law of blockade.

The practice has grown up among nations, however, and has been confirmed by international tribunals as a rule of international law, that the closure by decree of ports in the possession of insurgents is illegal and not binding on third nations. An often-quoted statement of the rule is the following from the opinion of the umpire in the case of *Compagnie Générale des Asphaltes de France*:

² Moore, Digest of International Law, Vol. II, p. 1119.

To close ports which are in the hands of revolutionists by government decree or order is impossible under international law. It [Venezuelan Government] may in a proper way and under proper circumstances and conditions in time of peace declare what of its ports shall be open and what of them shall be closed. But when these ports or any of them are in the hands of foreign belligerents or of insurgents it has no power to close or to open them for the palpable reason that it is no longer in control of them. It has then the right of blockade alone, which can only be declared to the extent that it has the naval power to make it effective in fact. (*Ralston's Report, Venezuelan Arbitrations*, 1903, p. 336.)

This was the stand of the United States in the Spanish Civil War of 1936 when the "neutral" states consistently refused to recognize the belligerency of the contending parties. The United States then phrased its position in almost the same language as in the present instance.³

The position of the United States in the China case as set forth in the note of June 28, 1949, appears to comport with the practice and authority above mentioned.

For obvious political reasons neither the Chinese Government nor the United States Government desires to concede to the Communist insurgents the prestige and status of a belligerent engaged in a quasi-international war, which would have resulted from a regularly imposed blockade.⁴

A further question is involved: To what extent may the Nationalist Government enforce the order of port closure? It seems clear that it cannot use force on the high seas to prevent ingress and egress of foreign vessels, since this is a measure only accorded to belligerents in time of war, according to the traditional view. The Chinese Government has a perfect right to proclaim a blockade (in the technical sense) of the insurgent port and thereby automatically concede the existence of a full-fledged war and acquire the accompanying belligerent rights of visit, search and capture, subject to prize court proceedings. But probably for the reasons already mentioned the Chinese Government did not do this, as it expressly admits,

³ Hackworth, *Digest of International Law*, Vol. II, p. 316; Vol. VII, § 629. See also the *Three Friends*, 166 U. S. 1; Briggs, *Law of Nations*, pp. 743-749; Dickinson, "The Closure of Ports in Control of Insurgents," this JOURNAL, Vol. 24 (1930), p. 69; Wilson, "Insurgency and International Maritime Law," *ibid.*, Vol. 1 (1907), p. 46; Padelford, "International Law and the Spanish Civil War," *ibid.*, Vol. 31 (1937), p. 226; Moore, *Digest*, Vol. II, pp. 1076-1123.

By the recognition of belligerency the recognizing state must treat both belligerents alike. It can no longer render aid to the former insurgents or the parent state without violating the law of neutrality, nor, before recognition of belligerency, render aid to the insurgents without violating the law of non-intervention (Garner, "Questions of International Law in the Spanish Civil War," this JOURNAL, Vol. 31 (1937), p. 66), though it could render aid to the parent state.

⁴ It may be noted that some writers believe that a right of quasi-blockade inheres in the parent state, which does not connote recognition of belligerency or necessarily have that effect.

and therefore is excluded by its own choice from enforcement activities on the high seas as described above.

It would seem, therefore, in this view that the right of the Nationalist Government to enforce port closure would be limited to action within Chinese domain including territorial waters, provided it does not try to exact the penalties allowed a regular belligerent. If it could maintain cruisers there, which is open to doubt, it might, on the authority of the *Oriental Navigation Company* case (United States—Mexico Claims Commission, *Opinions of Commissioners*, 1929, p. 29), legally prevent trade with the insurgent force. Padelford concludes that within the limits of territorial waters unrecognized belligerents enjoy the right to prevent access of supplies to their domestic enemies (*loc. cit.*, p. 233).

It follows that, according to the traditional view, any interference with vessels of third states outside of territorial waters is unwarranted and that efforts to prevent ingress and egress by threat or use of force on the high seas such as occurred in the case of some of the Isbrandtsen ships are violations of international law for which the Chinese Government is responsible for damages and losses sustained thereby. The Department's demands in these respects would appear to be proper and justified.

There remains a final question to be considered: How far may a third state go in protecting its merchant vessels in their attempts to trade with insurgent ports closed by order of the parent government? The Isbrandtsen Company, relying on standing naval regulations to the effect that commanders should protect merchantmen in their lawful pursuits,⁵ requested the protection of the United States Navy in its trade with Shanghai. This request was denied, even though the port closure was held to be invalid.

It must be conceded that the Naval Regulations are, as they state, to be carried out in harmony with the law and practice of nations. They clearly were not promulgated with a view to violating international law or infringing national sovereignty which is sacrosanct in international law. Third Powers must respect the national jurisdiction and not oppose the exercise by either party of the rights of war within the national domain. Insurgents and Nationalists are conceded to have the right to carry on hostilities between themselves as may seem necessary, foreign shipping taking the onus of venturing into dangerous zones. Third Powers acquire no superior rights of their own and are not to force their commerce with the insurgents against the physical opposition of the parent state in territorial waters, lest they be charged by the latter with intervention in the conflict. This is true at least of trade in military supplies destined to the insurgents. Thus American cruisers would not be justified in convoying the Isbrandtsen

⁵ Naval Regulation 0320 reads: "So far as lies within his power, acting in conformity with international law and treaty obligations, the senior officer present shall protect all commercial vessels and aircraft of the United States in their lawful occupation and shall advance the commercial interests of the United States."

ships through territorial waters to Shanghai, since this would be a violation of the law of non-intervention in internal affairs. As declared by Secretary Seward in 1862 at the time of the New Granada insurrection, the United States

regards the government of each state as its head until that government is effectually displaced by the substitution of another. It abstains from interference with its domestic affairs in foreign countries, and it holds no unnecessary communications, secret or otherwise, with revolutionary parties or factions therein.⁹

Such strict impartiality, however, does not mean that United States cruisers must stand idly by while American lives and property engaged in innocent trade are endangered by wanton and reckless action of the contestants contrary to the rules of civilized hostilities. On the other hand, American ships, on their part, cannot expect protection when they invite disaster by crossing the line of fire or taking other provocative action. But within those limits it would seem that they should see that American shipping is guarded in lives and property from promiscuous and illegal firing of either party whether on the high seas or in territorial waters.

Although the Isbrandtsen ships apparently attempted to breach the closure order contrary to the warnings of the Department of State and thereby contributed to the damage suffered, yet the fire of the Chinese gunboat, if outside territorial waters, was none the less wrongful. Perfectly lawful means of preventing trade were open to the Chinese Government. One method was laying a mine-field within territorial waters, as it appears was finally accomplished and widely notified. The facts relating to the attack of January 9th on the *Flying Arrow* as she approached the mouth of the Yangtze are not clearly established. It is somewhat incredulous, as alleged by the Chinese, that signals and warning shots to halt were ignored and that the devastating gunfire some twenty miles offshore was necessary to prevent her entering the mine-field. In view of past attacks by the Chinese and notice of a mine-field in the Shanghai approaches, it would seem to have been the part of prudence to halt on warning and ascertain the situation. The contrary would be asking too much of fortune. If this attack occurred on the high seas, it would seem the American destroyers should have given protection.

L. H. WOOLSEY

SOME THOUGHTS ON THE RECOGNITION OF NEW GOVERNMENTS AND RÉGIMES

The general furore attending the Soviet challenge to continued representation of Nationalist China on the Security Council and other bodies of the United Nations has served to bring to a focus, and direct public attention to, the changing criteria as to the legality or the "legitimacy"

⁹ Moore, Digest, Vol. VI, p. 20.

of changes in government and changes in régime within states whose recognized status is not in question. Certainly, in the halcyon days before World War I, when changes in statehood were few and far between, international law did not greatly concern itself with the legal premises on which individual governments acted in defining their *rappports* with new governmental régimes in established countries. What, one might ask, was the use of finding juristic formulae to express acceptance of situations in which the heady wine of factionalism repeatedly burst the frail bottles of nineteenth-century constitutionalism in various parts of the world? Apart from counseling circumspection and moderate delay in acting, lest too precipitate a recognition of a new government should appear to be interference in the internal affairs of a state, general discussions tended to suggest procedural formalities of an almost catechistical character, whereby the actual *détenteurs du pouvoir* in any country could be brought to book as to the sincerity of their intentions to observe past contractual engagements with regard to the nationals, property, vested rights and concessionary privileges of the particular governments concerned. This kept the discussion on grounds of international rather than municipal law, and avoided the necessity of looking behind the returns to test succession to authority in government in terms of constitutional law. Thus any clear or uniform distinction between *de facto* and *de jure* status of a claimant to represent a fully recognized state tended to disappear into the *coulisses* of diplomacy. "Expectant expediency" might well suffice as the most terse characterization of what the official attitude of foreign Powers should be. And if, in the amorphous stage of international institutions, this tended to become a passive acceptance of internal iniquities for the sake of maintaining the external peace between states, it is hardly to be wondered at. Formal criteria by which to judge the situations arising were fundamentally lacking. Such was the situation, by and large, down to 1913.

Seen in that retrospect, the efforts of President Wilson to develop new juristic criteria for evaluating the lawfulness of succession to power of newcomers in old states had no very secure footing on which to stand. They can be viewed in our day as persistent attempts to invoke, as the binding rule of conduct among governments, the fundamental principles and appropriate constitutional stipulations of the country seeking recognition. In default of an international authority or criterion, the touchstone was domestic and constitutional. While possibly operable in an ordered, stable or static society, the norms proposed by Wilson were invoked on behalf of claimants to authority in a period of unprecedented social and political upheaval, especially in Mexico, when the very norms of domestic behavior were not only in question, but in the melting pot. Hence the experiment, however laudable, tended in operation to throttle the course of a revolution and to hold volcanic forces within a constitutional

straight-jacket. Failing to stay, by a Canute-like fiat, the tides of revolution, Wilson in fact changed ground fundamentally, and eventually sought, by divers means, to legitimate the new authority by concerted and collective recognition, setting in this connection far-reaching precedents which Sumner Welles, in analogous circumstances a quarter-century later, was only too eager to follow. What is significant for us out of that epoch of transition is that the period of fumbling for momentary remedies for exceptional situations gave birth to both collective recognition and general international organization. Only from a "Thirty Years' View" is it possible to see the juxtaposition, then the slow gravitation, of principles toward each other.

I have noted elsewhere the immediate effects, doctrinal and practical, of the creation of the League of Nations and the specific stipulations of the Covenant upon the general problem of new states.¹ While that study concerned primarily fully self-governing states, colonies and dominions, it became a manifest impossibility for the League Assemblies to admit new states as Members without simultaneously recognizing their governments and amassing considerable documentary evidence as to the extent of recognition of both in the world outside of the *Salle de la Réformation*. And after the rounding out of formal admissions, it became part of the work of one of the more important functionaries of the Secretariat to do what probably not even the best organized foreign office was then doing—to keep an up-to-the-minute box-score on recognitions of *governments*, in order to have in hand at least the basic, elemental evidence for formulating an official "League policy" in the field of recognition, whenever that became pertinent to the transactions of the League. Within less than a decade of formal operation, the quintessential data for concerted, collective policy, even for a certain degree of League autonomy in such matters, were gathered from all corners of the earth and methodically analyzed to determine the trends of action. While never pushed too far under the Covenant, the collective recognition doctrine, as applied to governments, became an "inarticulate major premise" of the League's conduct of day-to-day affairs. Starting out on a perfectly casual *de facto* basis, it went through a limited period of crystallization to such an extent that the Secretariat, while never going back of the returns to challenge the status of any representative of a new government on the territory of a Member State, did develop a limited procedure of regularization, whenever a change of internal régime took place in the homeland of any League Member. In a number of instances it directly asked the home government, by cable or radio—in some cases merely by formal letter—for fresh documents re-accrediting the "permanent delegates," an institution unknown to the letter of the Covenant; in others, it required fresh credentials

¹ The League of Nations and the Recognition of States (University of California, 1933).

from career diplomats stationed in Europe and only intermittently serving as official representatives to *ad hoc* conferences called to meet under League auspices. Since, to a certain extent, the League was compelled to act quickly, it frequently sought by cable or radio "full powers," and on receipt of assurances via such media, allowed representatives to sign treaties and conventions, awaiting the eventual arrival, by mail or courier, of the corroborating documents. No instance is known to the writer of the failure of home governments to provide such validating data.

The League therefore appears in retrospect to have broken important ground in deciding, of its own accord, the degree and extent to which it could officially recognize new governments in Member States. This writer is not aware of any instance in which Assembly committees ever reversed the Secretariat; on the other hand, their credentials committees, so far as is known, invariably followed the "official line" in seating delegates from governments with which the Secretariat was *en rapport*. This tended to make the Secretariat feel on a surer footing and was undoubtedly a guide to the changing personnel of successive Assembly commissions. This was, *a fortiori*, also true of the Secretariat in its relations to the Council, the commissions and the Permanent Court of International Justice. Save as the Stimson Doctrine was invoked in its particular frame of reference, the League adventitiously, then incrementally, but always non-contentiously, developed an articulating recognition policy vis-a-vis new governments and régimes, to which virtually all Members tended to conform.

Between the fumbling first efforts of the League to cope with the problems arising out of the recognition of new governments and the present strident controversy over the succession to Nationalist China lie nearly thirty years of diplomatic fencing, of attempts to solve the problems arising from a change in *détenteurs du pouvoir* on a unilateral, bilateral or multilateral basis. The period has witnessed no less ponderous efforts to accept juridically the consequences of far-reaching changes in régime, politically and economically. Ordinary shifts in the succession to titular power or the chieftainship of state can, and are, quickly decided by almost purely verbal formulae, but changes in economic and social régime are unquestionably far more controversial and litigious. Whether international usage will come formally to acknowledge such a distinction is, of course, indeterminate, but the course of the last quarter-century is strewn with ineffectual efforts at agreement on appropriate legal phraseology whereby static or conservative régimes seek to tether and harness the champing or runaway steeds of fast-moving, revolutionary, social and economic change. In the 'twenties and 'thirties this sometimes took the form of the most elaborate stipulations and exactions on the part of the recognizing state, but (save for the unsuccessful venture at Genoa in 1922) always at the level of national diplomacy, to the complete exclusion of international machinery from the process. This sedulous disengagement

of the modalities of recognition of new régimes from the procedures of the then existing nexus of international institutions perhaps reflects an understandably high degree of skepticism as to the perdurance of the ensemble of the institutions of international government. At all events, and irrespective of the reasons formally given, it succeeded in confining the rapprochements of antithetical régimes during the immediately past generation to the levels of national diplomacy, entirely excluding supranational agencies.

Our own generation is not so privileged, although it cannot be entirely gratified at the initial efforts made to raise recognition problems to a wholly intergovernmental level. The failure of fruition of the efforts made, primarily at Yalta and Potsdam, but to a lesser degree in subsequent meetings of the Council of Foreign Ministers, to determine the composition of governments still to be recognized in the surrendered or satellite states is attributable, in part, to the fact that the principal members of the wartime alliance were still reluctant to entrust to the tender mercies of an inexperienced general international organization such matters of high policy as the recognition of new governments; in part, to the rather naïve belief—which also underlay the negotiation of the Minority Guarantee Treaties at Paris in 1919—that an almost immutable allocation of territory in return for a pledge of future conduct would automatically guarantee the immutability of status, whether of governments or of minorities. In any event, the recognition of changes in social régime was confined to Great Power politics on the understanding that members of the general international organization would be in honor bound to follow implicitly the decisions of the Big Three or Big Four. Such was the locus of the question between Yalta and Potsdam. The primordial consideration was to keep the decision of such questions *intra mures*, or at least out of the hands of the United Nations.

Whatever the dubious virtues of such a selective, closed-corporation settlement then, the problem today is obviously incapable of solution on a comparable basis. Hence the Soviet challenge to the Security Council, as, indeed, to all United Nations bodies, confronts the United Nations Organization with the necessity of taking far-reaching decisions. For the first time in the history of international organization, the problem of a change of régime in a Member state is tending to pass out of the exclusive domain of national diplomacy and to be settled in terms of the stipulations of the Charter, rules of procedure of the various bodies involved, or by the setting of new and far-reaching precedents. The question is still unsolved at this writing (March 20, 1950), but the answer given to it by the United Nations may well mark an important transition point in the history of both international law and international organization.

MALBONE W. GRAHAM

THE PRINCIPAL LEGAL AND POLITICAL PROBLEMS INVOLVED IN THE KASHMIR CASE

The legal and political issues involved in the Kashmir case between India and Pakistan are more than usually complicated. For various reasons experienced and careful observers have been led to fear that the problem may well drag on for several years before a definitive solution is reached. Obviously no final judgments are yet available on the various issues involved, but it may be useful to analyze the problem at this stage with a view to identifying the principal legal and political questions at stake and expressing tentative appreciation of some of the issues. At the same time it must be remembered that strong Indian tenacity in the matter is matched by even stronger and more emotional resentment in Pakistan, which feels that it has been defrauded of part of its very self in Kashmir.

The British Government, on the eve of withdrawing from India, made an effort to reserve for the Princes, whose States had enjoyed a special relationship with the Paramount Power, the privilege of acceding (or not) to one or the other of the two states into which India had somewhat unexpectedly, not to say unfortunately, been divided. Therein arises the first problem: Could such a stipulation enjoy any validity under British, Indian, or international law? Probably an affirmative answer must be given to this question, although some reservations thereon may have to be made, as will appear at once.

The Maharaja of Kashmir in fact acceded to India on October 27, 1947. This action was taken largely in order to obtain protection against invading forces which had begun to enter Kashmir from Pakistan, although made up at the beginning of elements not part of the forces of that state. This accession was accepted, but at the same time the Indian Government, through Prime Minister Nehru, declared that this accession would have to be confirmed, not to say tested, by a plebiscite. For this declaration nothing in the original stipulation (based on British and Indian agreement) or in international law could be cited, but it corresponded closely to Indian professions of self-determination. Once made, and noted by Pakistan and other countries likewise, it has come to be more or less binding.

India also took the matter to the United Nations in January, 1948, in order, as it was explained, to avoid the necessity of invading Pakistan, with a view to putting an end to the invasion of Kashmir, and thus avoid war between the two countries. Undoubtedly India was justified in taking such a step, in view of the failure of Pakistan to prevent the invasion, at least, although there may be some doubt as to just what she expected to obtain thereby, especially in view of the limited capacity of the United Nations to prevail upon Pakistan, or the forces invading Kashmir, to withdraw therefrom.

Thereupon the United Nations, acting well within its powers, sought to bring about a state of peace or an armistice or truce between the contending

parties which would permit a solution of the main problem—of sovereignty over Kashmir—on the merits; that is, presumably, the holding of the plebiscite. Inevitably this led to placing Pakistan and India, morally and legally, on a plane of equality, a curious result of any mediatory effort, to which the Indians very naturally object strenuously.

Through the efforts of the United Nations a cease-fire agreement was signed on January 1, 1949; this was a definite beginning and important as such. There followed protracted, complicated, and not entirely candid efforts to implement the agreement and provide for demilitarization of the territory looking toward the plebiscite. Drawing a line between the opposing forces, securing withdrawal of forces invading from Pakistan, disbanding "Azad" Kashmir forces, organized, in their later stages at least, in sympathy with Pakistan, reducing the strength of Indian forces, providing for control and policing of the extreme Northern districts in the wilds of the Himalayas—such were the tasks before the United Nations Commission, and it is no wonder that this body has not enjoyed complete success. For the failure so far encountered, mistakes of the Commission itself and somewhat unwise interventions by Great Britain and the United States (animated mainly by desires for a quick settlement but giving rise to suspicions of either anti-Indian or pro-Muslim feelings on one side or the other, not to mention any desires for air bases) are in part to blame, as well as some intransigence and procrastination on the part of both India and Pakistan.

From this point onward the way seems, for the immediate future, clear though difficult. The demilitarization agreement must be worked out, but the reduction of forces on either side will be very difficult to secure. The plebiscite also must probably be carried out—India adheres to this principle and of course Pakistan will insist upon it and a plebiscite on a State-wide basis; the only escape would be partition of Kashmir, or an independent State, and both the Kashmiri and the Indians would probably prefer the plebiscite. There would, however, be some Indian opposition to international conduct of the operation, although at one time Nehru suggested United Nations supervision; and there must also be noted the extreme difficulty and delay involved in reconstructing the Kashmir electorate of October, 1947. There would almost certainly be adamant Indian opposition to any arbitration of the central issue; and it should be noted that proposals for arbitration so far have related solely to issues arising under the cease-fire agreement. In case amicable execution of these steps proves impossible, the United Nations possesses few, if any, resources for securing results, and the ultimate solution must flow from agreement between the parties.

On the merits of the principal question—sovereignty over Kashmir—speculation from the outside is rather futile. Kashmir is strategically important to both countries in view of its boundary lines, but appears to be

geographically (topography, rivers, roads) and economically an appendage of Pakistan. It is predominantly Muslim, and the Indian answer that religion is not to be the basis of the new Indian state, which contains many millions of Muslims, is not entirely conclusive for various reasons. On the other hand, it does appear that the Kashmiri, under Sheikh Abdullah, may prefer to avoid the rather strict Muslim state of Pakistan, with its somewhat feudal economic pattern, and join the new India. How the plebiscite would go if held at the present moment—or in a year, or five—is very much of a guess. How, likewise, a military struggle between Pakistan and India—and such a struggle would probably flame into a general war in the sub-continent, if not elsewhere—would go if the peaceful procedures of the United Nations were to fail, is also conjectural, except that it would be both prolonged and fanatical, given the character of the terrain and the attitudes of zealous patriots in both countries, in spite of Indian predominance in men and resources. It is obviously devoutly to be hoped that the United Nations Members can lead and aid India and Pakistan to a solution of the problem and do this without further dangerous delay.

PITMAN B. POTTER

THE AMERICAN COMMITTEE ON DEPENDENT TERRITORIES

The presence in the American Continent of colonies and possessions of non-American Powers first became acute at the Meeting of Foreign Ministers at Habana in July, 1940. What if Germany, as appeared more than likely, should win the war and take over by way of conquest the colonies and possessions of the defeated Powers, Great Britain, France and Holland? The danger which had been foreseen at the Meeting of Foreign Ministers at Panama in 1939 had now become more imminent. It had always been a corollary of the Monroe Doctrine that the United States would oppose the transfer of colonies and possessions in America from one European Power to another, particularly if the latter was a strong Power capable of constituting a future danger to the United States. Under the circumstances, then, it was clear that the United States would be inflexibly opposed to the transfer of the colonies and possessions to Germany. A threat to the peace was presented, and under the terms of the Convention of 1936,¹ consultation was in order.

The Meeting of Foreign Ministers at Habana acted promptly. In spite of the danger involved in challenging Germany, the American States were unanimous in reaffirming in even more explicit terms the principle of collective security foreshadowed in the Convention of 1936 and in the

¹ This JOURNAL, Supp., Vol. 81 (1937), p. 53.

Declaration of Lima of 1938.² Declaration XV of the Final Act at Habana proclaimed in the clearest terms that any attack by a non-American state against the integrity or inviolability of the territory, the sovereignty or the political independence of an American State should be considered "as an act of aggression against the States which sign this declaration."³ The Meeting of Foreign Ministers then went on to adopt a convention based on the principle that any transfer of the sovereignty, jurisdiction or possession of American territory from one non-American Power to another as a result of the events which were then taking place in Europe would be regarded by the American Republics as against American principles and as a threat to their peace and security.⁴ Provision was made for the establishment of an Inter-American Commission for Territorial Administration, which was authorized to set up a provisional administrative régime to administer the territories in the interest of the security of America until such time as the territories were in a position to govern themselves or be restored to their former status.

Accompanying the convention was a declaration-resolution (No. XX) which made provision for emergency action pending the ratification of the convention.⁵ The "Act of Habana," as it was called, recognized the danger to the peace and security of the American Republics of a transfer of possessions from one non-American country to another and created "an emergency committee" to apply the provisions of the Act and to assume administration of the region attacked or threatened. Provision was made that when the emergency ceased to exist the territories were to be organized as autonomous states or be restored to their previous status.

The situation was complicated by the fact that two of the American States had long-standing controversies with a non-American state, Great Britain, with respect to sovereignty over certain colonial possessions, Guatemala claiming sovereignty over Belize, otherwise known as British Honduras, and Argentina claiming sovereignty over the Falkland Islands. It was not merely a general principle, therefore, that was at issue, but a concrete interest on the part of the two American States. This interest would without doubt be promoted to the extent that the general principle might be successfully advanced. The defeat of Germany, therefore, did not close the matter. In 1947 Guatemala requested the Governing Board of the Pan American Union to include the topic of "European colonies in America" in the program of the Ninth International Conference of American States, to be held at Bogotá the following year. At the same time Guatemala submitted a draft declaration reciting in its preamble that the historical process of the emancipation of America would not be concluded "so long as there remain in the Continent regions subject to the status of colonies," and declaring:

² *Ibid.*, Vol. 34 (1940), p. 199.

⁴ *Ibid.*, p. 28.

³ *Ibid.*, Vol. 35 (1941), p. 15.

⁵ *Ibid.*, p. 18.

That it is a just aspiration of the Republics of America that the status of colonies that subsists in the Continent be terminated.

Acting in accordance with the agenda prepared for it, the Bogotá Conference assigned the Guatemalan project to Committee VI dealing with Juridical-Political Matters. The Committee moderated the preamble of the project and at the same time extended its scope. As adopted by the Conference the resolution (XXXIII)^a was preceded by the strong statement "That it is a just aspiration of the American Republics that colonialism and the occupation of American territories by extra-continental countries should be brought to an end"; but the resolution itself went no further than to create an "American Committee on Dependent Territories," composed of one representative of each member of the Organization of American States, the purpose of which was "to centralize the study of the problem of the existence of dependent and occupied territories, in order to find an adequate solution to that question."

The Brazilian Delegation dissented, stating that, while under other circumstances the draft declaration might have merited its support, it considered that an inter-American conference was "not an appropriate forum for debating a question that affects the interests of countries outside the continent." A distinction was drawn between European possessions that were the subject of litigation and those that were not, the Brazilian Delegation pointing out that in the case of the former there were the accepted procedures of pacific settlement, while in the case of the latter there were the provisions of Article 73 of the Charter of the United Nations in accordance with which the Powers responsible for administering non-self-governing territories assumed a sacred trust to govern them, and that the attainment of self-government on the part of these territories must be brought about through the General Assembly of the United Nations. The Delegation of the United States likewise declined to sign the resolution, without, however, assigning reasons for its unwillingness to do so.

In accordance with the terms of the Bogotá Resolution the Committee was to be convoked by the Council of the Organization, by prior agreement with the Cuban Government, as soon as fourteen members had been appointed by their respective governments. The meeting was duly convoked for March 15, 1949, thirteen members being present, the Venezuelan member absenting himself because of a controversy between his government and the Government of Cuba. In anticipation of the meeting the Pan American Union prepared for the use of the members a volume of informative material giving the background and setting of the problem, accompanied by a select bibliography on dependent territories and other connected matters.

^a Final Act of the Ninth International Conference of American States, Bogotá, Colombia, March 30-May 2, 1948 (Washington, D. C., Pan American Union, 1948), p. 47.

The plenary sessions of the Committee fell into two separate periods, the first lasting from March 15 to March 29, and the second lasting from July 11 to July 21, 1949. In the interval between the plenary sessions the Committee divided itself into subcommittees, dealing respectively with initiatives, credentials, regulations and budget, administration, colonies, and occupied territories. The main task of the Committee fell naturally to the last two of these subcommittees. Under the head of "colonies" or "colonial territories" the Committee enumerated the following list based upon the reports presented to the Secretary General of the United Nations in accordance with the provisions of Article 73(e) of the Charter relative to non-self-governing territories: Greenland, French Antilles, French Guiana, Clipperton Island, Dutch Antilles, Dutch Guiana or Surinam, Lesser British Antilles, Bahamas, Barbadoes, British Guiana, Jamaica and its dependencies, and Trinidad and Tobago. The designation "occupied territories" was used in the sense of territories held to be justly the property of American States but occupied *de facto* by a non-American Power. These territories included Belize, or British Honduras, claimed by Guatemala, with a collateral interest on the part of Mexico, and the Malvinas or Falkland Islands, the South Georgia Islands, the South Sandwich Islands and Argentine Antarctic, claimed by Argentina.

First among the specific tasks assigned to the Committee on Dependent Territories by the Bogotá Conference was that of centralizing all information upon the problems referred to it by the Bogotá resolution. On the basis of this information the Committee was to study the situation presented with the object of seeking "pacific means of eliminating both colonialism and the occupation of American territories by extra-continental countries." Reports were to be submitted by the Committee to the governments dealing with the separate colonies, possessions and territories, and on the basis of these reports further action was to be taken by the first Meeting of Consultation of Ministers of Foreign Affairs to be held after presentation of the reports.

The Subcommittee on Colonies prepared a report, based upon a plan presented by the Cuban Delegation, setting forth for each separate colony geographical data, historic antecedents, population, culture, economic and social conditions, health and public assistance, and political conditions. These separate reports were based upon material furnished by the different delegations, together with information taken from a work published by the United Nations in 1948 bearing the title "Non-Autonomous Territories: Summary and Analysis of the Information Transmitted to the Secretary General in 1947," and from other sources believed by the subcommittee to be authoritative. While the reports upon the different colonies contain nothing that is original, they are on the whole reliable summaries of the items listed in the plan of work, and they show no bias

or prepossession against the three European states to which the respective colonies belong.

Having prepared its studies upon the separate colonies there was little that the Subcommittee on Colonies could do by way of suggesting to the Committee practical measures to bring about the desired objective. The colonial system could be condemned in as strong language as the Committee might choose to adopt, but beyond that the Committee could only appeal to the three non-American Powers to coöperate, in the hope that they might be influenced by the public opinion of the countries participating in the Committee. The resolution adopted by the Committee bears the lengthy title: "Request for the Coöperation of Non-American Countries to the End that their American Colonies and Possessions may be Established as Independent States or Placed under the Trusteeship System of Administration in Conformity with the Charter of the United Nations."⁷ The preamble of the resolution proclaims that "the colonial system is manifestly undergoing a process of liquidation" which dates from the end of the first world war, that the American Hemisphere cannot remain aloof from the process, and that as long as colonies exist in the Western Hemisphere America will not have achieved its complete political integration. The resolution itself requests the non-American countries having possessions in America to coöperate in solving the problem, "to the end that their colonies and possessions may be established as independent and democratic states." It recognizes, however, that certain colonies may not be prepared as yet to enjoy independence, in which case steps should be taken to have the colony placed under the trusteeship system of the United Nations. Lest colonies be confused with occupied territories, an exception is entered in respect to the latter, which were to be made the subject of a special recommendation.

Whether there would be any practical gain for the American States in having the more advanced British, French and Dutch colonies "established as independent and democratic states" was not seriously considered, so far as the records indicate. Nor was serious consideration given to the fact that the more backward colonies might continue in much the same condition if they were to be converted into trust territories with the same mother countries acting as administering authorities. What the Committee sought to do was to proclaim a principle, and thus gain indirect support for the position it was to take in the matter of occupied territories.

In marked contrast with the report of the Subcommittee on Colonies was the report prepared by the Subcommittee on Occupied Territories, which was of a distinctly polemical nature, being a justification on the part of Guatemala and Argentina of their claims to sovereignty over the

⁷ Resolution V, *Acta Final de la Comisión Americana de Territorios Dependientes, Habana, July 21, 1949* (Pan American Union, Cong. and Conf. Series, No. 57), p. 9.

areas occupied *de facto* by Great Britain. The very fact that Belize and the Malvinas and Antarctic Islands were designated as "occupied territories" was sufficient to indicate that the case with regard to these territories was a closed one. The reports, therefore, omit the informative material presented by the Subcommittee on Colonies and confine themselves to communications and declarations received from Guatemala and Argentina.

The case of Belize was complicated by the fact that Guatemala's claim against Great Britain was in turn contested by Mexico as to that part of Belize bordering on Yucatan; and the report of the subcommittee contains two communications from the Government of Mexico submitted in justification of the claim. Inasmuch, however, as Resolution XXXIII of the Bogotá Conference had been limited to seeking pacific methods for the elimination of the occupation of American territories by extra-continental countries were referred to a Meeting of Consultation of Foreign Ministers, ment upon the Mexican claim. Instead it submitted a draft agreement which appears in the Final Act under the title: "III. Reports and Communications on Belize,"⁸ in which the documents presented by the two countries were referred to a Meeting of Consultation of Foreign Ministers, or it might be to the next Inter-American Conference, accompanied by a wish that the differences between the two countries should be solved by the pacific procedures set forth in American treaties in force.

When the subcommittee came to propose a recommendation upon the controversy between Guatemala and Great Britain, it found itself embarrassed by the unwillingness of Guatemala to accept the Mexican claim on the same basis as its own. In consequence the draft of a recommendation submitted by the Working Group, which called upon Great Britain to submit the controversy with Guatemala to a decision *ex aequo et bono* of the International Court of Justice, and which contemplated that Mexico might be permitted to intervene in the case in accordance with the terms of Article 62 of the Statute of the Court, was opposed by Guatemala on the second point. The recommendation was then divided into two parts, the first part being adopted and the second part being defeated for lack of the necessary two-thirds majority. The Mexican Delegation thereupon withdrew from the Committee. A compromise was, however, later worked out, in accordance with which the "agreement" entitled "Reports and Communications on Belize" was submitted to the Committee, accompanied by a resolution entitled: "IV. Solidarity with the Just and Legitimate Claims of the American Nations in Relation to the Occupied Territories."⁹ The resolution, while repeating in its preamble the strong language of the preamble of Resolution XXXIII of the Bogotá Conference in respect to the elimination from the Continent of every status of dependency, what-

⁸ *Op. cit.*, p. 8.

⁹ *Ibid.*

ever its form, political, economic or juridical, goes no further than "To express its sympathy with every just and legitimate claim of any American nation, to reaffirm the principles relative to the emancipation of America that have been solemnly set forth in the International Conferences of American States, and to adopt as its rule of conduct the pacific settlement of all disputes in accordance with justice and international law."

It was to be expected that certain elements in Puerto Rico, which are not satisfied with the large measure of self-government which the island enjoys, but seek its complete independence should take advantage of the meeting of the Committee on Dependent Territories to advance their cause. The Independence Party and the Nationalist Party both presented numerous communications; and while the Committee was unwilling to admit representatives of the two organizations as observers, it allowed them the privilege of submitting reports to the Committee in writing.

On March 28, 1949, at its seventh plenary session, the Committee decided that it was competent to take cognizance of the case of Puerto Rico; but in view of doubts expressed by a number of the delegates, it was decided that, without interrupting consideration of the problem, the question of competence should be referred to the Council of the Organization of American States. The Council, on its part, considered the matter at its session of April 21, and referred it to its Committee on Inter-American Organizations. At a later meeting on May 26, after receiving the report of its Committee, the Council decided that, in view of the fact that the Charter of the Organization contained no specific provisions in respect to bodies such as the Committee on Dependent Territories, and the governments alone were competent to decide upon the meaning of the resolutions adopted at conferences, the decision of the Committee on the matter of competence which had been referred by the Committee to the Council should be in turn referred to the governments through their respective representatives on the Council, inquiring of them

whether Resolution XXXIII of Bogotá authorized the said Commission to study the situation of any American territory which finds itself under the sovereignty and effective jurisdiction of any American State.

In the meantime, offsetting the reports presented to the Committee by the two political parties, the Senate of Puerto Rico adopted, on April 15, 1949, a unanimous resolution censuring the action of the Committee and stating that Puerto Rico would make its own decision on the matter of its future relationship to the United States. Puerto Rico, the resolution stated, enjoyed all the rights of American citizens, and it would be granted independence immediately if it were asked for. Paralleling the action of the Senate of Puerto Rico was a cable from the Puerto Rican Association of Women for Statehood, which expressed the desire of the Association "to

inform this Committee that the last general elections show by an overwhelming majority that Puerto Rico does not desire to detach itself from the United States of America, of which it is not in fact a colony but a potential state."

On the date of the signing by the Committee of its Final Act thirteen governments had replied to the inquiry submitted by the Council of the Organization, three pronouncing in favor of the competence of the Committee to study the case of Puerto Rico and ten opposing, with eight governments failing to answer. In this situation the Committee adopted unanimously a resolution entitled: "VI. Study of the Case of Puerto Rico,"¹⁰ which, after reciting the circumstances of the case of Puerto Rico, transmits to the Council of the Organization all of the antecedents and reports with reference to Puerto Rico "in order that the Council may deal with them as it considers proper"; and it declares:

that, in view of the present economic, political, and social situation in Puerto Rico, the Committee hopes that this nation will have an opportunity to express itself definitely and freely so as to decide its own destiny.

The Final Act was signed on July 21 and the meeting came to an end. In accordance with the resolution of the Bogotá Conference the Committee submitted its report to the individual American governments "for their information and study," and the report became thereupon an item on the agenda of the next Meeting of Consultation of Ministers of Foreign Affairs.¹¹

C. G. FENWICK

UNITED STATES TREATY DEVELOPMENTS

In July, 1948, the Department of State inaugurated a loose-leaf service entitled *United States Treaty Developments*.¹ The compilation is designed to meet the long-felt needs of the Department and of international lawyers, historians and research workers for a continuously up-to-date reference service providing factual information on developments affecting international agreements entered into by the United States. The project, which was urged upon the Department of State by a committee of the American Society of International Law under the able guidance of Professor Willard B. Cowles,² is being compiled under the direction of Mr. Bryton Barron of the Office of the Legal Adviser, Department of State.

¹⁰ *Op. cit.* (note 7, *supra*), p. 10.

¹¹ *Informe de la Comisión Americana de Territorios Dependientes, La Habana, 1949; Memoria de la Comisión Americana de Territorios Dependientes, La Habana, 1949.*

¹ *United States Treaty Developments*. Department of State Publication 2851. Washington: U. S. Government Printing Office. 1st Release (dated August, 1947), July, 1948, \$4.00; 2nd Release (dated June, 1948), April, 1949, \$3.25; 3rd Release (dated December, 1948), October, 1949, \$3.50; 4th Release (dated June, 1949) (in proof).

² See Proceedings, American Society of International Law, 1948, pp. 184-190; *id.*, 1947, pp. 172, 203; *id.*, 1948, pp. 119, 162.

The need for establishing such a service was set forth by Professor Cowles as follows:

... Information as to when a treaty was signed, ratified, and the instruments of ratification exchanged is found in one place; later adherences in another; implementing acts of Congress in a third; administrative regulations, effectuating a treaty directly or pursuant to acts of Congress in a fourth or fifth; and, in order to ascertain how a treaty provision has subsequently been interpreted by judicial or quasi-judicial bodies, it is necessary to go to places different from any of these. . . . To obtain comprehensive data concerning a particular article of a specific treaty from these diverse sources under present methods, is a time-consuming task; and at the end . . . the researcher . . . is likely to be uncertain whether he has obtained all pertinent data. . . .

... the time has come for the Department of State to publish annotations to the treaties currently in a loose-leaf service.³

United States Treaty Developments is intended to include all pertinent data with reference to particular United States treaties except the texts, which are readily available elsewhere. The type of information provided with respect to each agreement to which it is pertinent includes notes as to date and place of signature, effective date, duration, citations to text, signatories (except of multipartite instruments, in which case only parties are listed), ratifications, adherences, accessions, acceptances, reservations, amendments, extensions, terminations (as a whole or as to particular provisions), authorizing and implementing legislation, Executive action, administrative interpretations and regulations, opinions of the Attorney General, court decisions, other relevant action, and, in some cases, bibliographical references to relevant official publications of the United States Government or of the United Nations.

The sheets are arranged chronologically by dates of signature of the agreements, or, if an instrument is not signed, "by the date customarily used in citing it." Each agreement is cited to the Department of State *Treaty Series*, *Executive Agreement Series*, or *Treaties and Other International Acts Series* and, where printed therein, to the *Statutes at Large*, to the Miller and Malloy treaty collections, the *League of Nations Treaty Series*, and the *United Nations Treaty Series*. A valuable, detailed, cumulative Index, by countries and subjects, fills over 180 pages at present, and the utility of the compilation is enhanced by numerical lists of the *Treaty*, *Executive Agreement*, and *Treaties and Other International Acts Series*.

Eventually, *United States Treaty Developments* is intended to "serve as a comprehensive guide to official material respecting all treaties and other international agreements to which the United States has become a party in nearly two centuries of treaty-making."⁴ At present, it contains annotations of some 700 instruments, about two-thirds of which were concluded

³ *Id.*, 1946, p. 184.

⁴ *United States Treaty Developments*, Preface.

between January 1, 1944, and December 31, 1948. The service "will be kept current as new agreements are published, and earlier agreements will be included as rapidly as possible, any recent development regarding an earlier agreement being made the occasion for bringing up to date the record with respect to that instrument."⁵ Thus, the latest release adds five pages of annotations to the Jay Treaty of November 19, 1794 (previously unlisted in the compilation) because of a recent judicial decision interpreting Article 2 of that treaty. The annotations include citations to fifteen Acts of Congress and ten Opinions of the Attorney General implementing the Jay Treaty, and twenty-nine court decisions interpreting its provisions. Revisions of annotations previously issued have already been made as to 275 agreements by the printing of new sheets to be substituted for the ones originally issued.

The service "is not intended to contain comprehensive notes, digests, or critical commentaries but merely to serve as a guide to materials of an authoritative nature."⁶ The decision not to include digests or elaborate annotations of pertinent judicial or administrative decisions has led to some criticism,⁷ but the Department of State has preferred to annotate the latter merely by citation to well-known sources while preparing more extended notes on data available only in the Department of State. It would be a convenience to have the texts of international agreements and more elaborate judicial annotations published along with the other materials in *United States Treaty Developments*; however, reasons of bulk and the limited funds available for the project justify concentration on the contribution which the Department of State is uniquely in a position to make. Although the annotations are in no sense comparable to the magnificent historical notes to be found in the Hunter Miller treaty edition, they are of greater utility to practitioners and scholars because they include citations to types of material deliberately excluded in the Miller edition.⁸

A few examples of the type of note of interest to international lawyers will suffice here. To the Treaty of Commerce signed at Belgrade, October 14, 1881, by the United States and Serbia (Treaty Series 319), is appended the information that the Kingdom of the Serbs, Croats and Slovenes considered treaties concluded by Serbia and the United States "as applicable to the whole territory of the Kingdom of the Serbs, Croats, and Slovenes"; that the adoption of the name "Yugoslavia" in 1929 did not affect existing treaties with the United States; and that, following the establishment of the Federal People's Republic of Yugoslavia in November, 1945, "Yugoslavia again confirmed its continued recognition of existing agreements with the United States" (citations here omitted). The Treaty of Peace with Italy, dated at Paris, February 10, 1947 (T.I.A.S. 1648), is annotated with

⁵ *Id.*

⁶ *Id.*

⁷ Proceedings, American Society of International Law, 1948, pp. 162-163.

⁸ *Cf. id.*, 1946, p. 185.

the information that the Government of Pakistan regards the Treaty "as binding on Pakistan since the instrument of ratification thereof was signed for India July 21, 1947, before the establishment of Pakistan as a separate state on August 15, 1947." Notes on the Constitution of the World Health Organization, signed by the United States at New York, July 22, 1946, indicate that it became effective as to the United States on June 21, 1948, as a result of a joint resolution of Congress approved June 14, 1948, although, because of a reservation of a right of withdrawal (not provided for in the Constitution of the WHO), the admission of the United States to membership was not approved by the World Health Assembly until July 2, 1948.

Appendices, which will also be kept up to date, include current information as to treaties pending in the Senate, treaties awaiting further action following approval by the Senate, treaties withdrawn from the Senate, pre-war bilateral agreements kept in force or revived in accordance with the treaties of peace following World War II, agreements in force between the United States and other American Republics, and a list of treaty provisions relating to rights of inheritance, acquisition, and ownership of property in force between the United States and foreign states, as well as the numerical Treaty and Executive Agreement lists and the cumulative index by country and subject. To these useful lists the addition of a list of treaties in force is contemplated.

The Department of State has provided an indispensable tool in *United States Treaty Developments*. The compilation has been prepared with informed imagination, skill and accuracy, with a view to providing a continuously useful and dependable working instrument. In addition to promoting efficiency by saving the time of many staff members of the Department of State, it is of incalculable and immediate utility to legal practitioners, scholars and teachers. The fact that the compilation is still incomplete, particularly prior to 1944, and the lag between a release and the terminal date of materials in that release is an annoyance which can be attributed to lack of staff and of funds. It is to be hoped that the Congress and the Department of State will provide adequately for the rapid completion and continued publication of this unrivaled service.

HERBERT W. BRIGGS

CURRENT NOTES

THE FIRST MEETING OF THE INTER-AMERICAN COUNCIL OF JURISTS

As these lines are written arrangements are being completed for an event which should be of unusual interest to the legal profession in the Western Hemisphere. Representatives of the American Republics are preparing to assemble in Rio de Janeiro for the first meeting of the Inter-American Council of Jurists.¹ Under the Charter of the Organization of American States, signed at Bogotá in 1948, the existing complex of agencies which had been evolving for over half a century into what came to be called the "Inter-American System," received a thorough-going and much needed overhauling. As part of this development, the former Governing Board of the Pan American Union became the new Council of the Organization; the Council was in turn separated from the Pan American Union, vested with functions of an advisory, co-ordinating and political character, and furnished with three principal organs for its enlarged rôle. One of these organs is the Inter-American Council of Jurists² which is intended to serve as an advisory body on juridical matters; to promote the development and codification of public and private international law; and to study the possibility of attaining uniformity in the legislation of the various American countries to the extent that this may appear desirable.³ Article 71 of the Charter of the Organization provides further that the Council of Jurists as well as its permanent committee, the Inter-American Juridical Committee of Rio de Janeiro, "should seek the coöperation of national committees for the codification of international law [as well as] of institutes of international and comparative law, and of other specialized agencies."

Prior to the creation of the Council of Jurists, a number of inter-American agencies had mushroomed in the field of international law, to be terminated finally at the Bogotá Conference. Many of these were agencies in name only, whose substantive functions were hopelessly entangled in the dead branches of duplication, overlapping, inaction and sterile achievement.⁴ Their activities are now merged in this new and, it is hoped, more efficiently coöordinated expression of hemispheric legal doctrine.

¹ Invitations have been issued by the Pan American Union in the name of the Government of Brazil for May 22 next.

² The other two organs are the Inter-American Economic and Social Council and the Inter-American Cultural Council.

³ Art. 67 of the Charter of the Organization of American States.

⁴ Eliminated at Bogotá were: The Committee of Experts on the Codification of International Law; the Permanent Committee on Public International Law; the Permanent Committee on Comparative Legislation and the Unification of Legislation; and

Since the Council of the Organization determines when its juridical organ shall be convened, as well as the program of work it shall undertake, the first meeting of the American jurists under the new arrangement was necessarily delayed pending appropriate action by the parent body, which, of course, would defer to the sentiments of the various member governments on the date selected. Recently, a complete agenda for this meeting was approved by the Council, the latter part of May being selected as the conference date after plans for an earlier session (September last) had been modified at the request of the Brazilian Government.⁵

On the agenda for the May meeting figure several important and controversial topics which frequently have provoked disharmony among the several American Republics. Of primary interest will be the examination of a number of projects assigned to the Council of Jurists by the Bogotá Conference, as well as certain other projects to be presented by the Inter-American Juridical Committee pursuant to various resolutions likewise adopted at Bogotá. The vexatious, quasi-juridical question of the recognition of *de facto* governments promises a lively and prolonged discussion. Also under consideration by the Rio experts will be a draft convention for the elimination of the use of passports and visa requirements; formulation of a draft statute for the creation of an Inter-American Court to guarantee the Rights of Man; a proposal by the Cuban Delegation at Bogotá recognizing the "Right of Resistance" in case of manifest acts of oppression or tyranny; a program for the codification and development of public and private international law; and a technical study on the scope of the powers of the Council of the Organization. It should be added, that after this agenda had been approved, the Honorable George Maurice Morris, distinguished chairman of the Inter-American Bar Association's Executive Committee, in a letter to Secretary of State Acheson recalled that the Commissioners on Uniform State Laws were preparing, jointly with the American Law Institute, a uniform commercial code; and he suggested that there be included in the Rio agenda plans whereby studies of meth-

the Permanent Committee of Jurists for the Unification of Civil and Commercial Law of America. For a summary of the activities of the inter-American system in the legal field prior to Bogotá, see Sanders, Department of State Bulletin, Vol. XVIII, No. 449 (Feb. 8, 1948), pp. 176 ff.

⁵ It was the Brazilian Government's position that the meeting of the Council of Jurists should be postponed because the Charter of the Organization had not yet entered into effect, only three ratifications having been received. Note of July 26, 1949, from Ambassador Accioly to Secretary General Alberto Lleras. But as the United States representative on the Council of the Organization aptly observed, Resolution XL of the Bogotá Conference (*cf.* Final Act of the Ninth International Conference of American States, p. 52) provides explicitly that pending the entry into force of the Charter, the new organs which it contemplates should be established on a provisional (*e. g.*, coöperative) basis; and, in fact, such is presently the basis upon which the Organization itself is functioning. Letter of Aug. 30, 1949, from Mr. Daniels to Secretary General Lleras. For the date finally agreed upon, see above, note 1.

ods for obtaining uniformity in the legislation of the American countries in this field might be conducted.⁶ The suggestion met a favorable reception in the Department of State, and was immediately communicated to the Inter-American Juridical Committee. It is therefore likely that the Council of Jurists will consider, at least in a preliminary fashion, methods whereby the desired uniformity in legislation can best be achieved.

By an historical anomaly, although plans for the initial meeting of the Council of Jurists are only now being perfected, a permanent appendage (or, more accurately, a prefabricated arm!) of that body—the Inter-American Juridical Committee—has been sitting continuously in Rio performing necessary preparatory work in anticipation of its foster parent's formal but belated inception. Prior to the Bogotá Conference the Committee's status was defined by a resolution of the Third Meeting of Foreign Ministers at Rio de Janeiro in 1942, which expanded the functions of the Neutrality Committee created at Panama in 1939, changed its name, and charged it with the study of legal problems confronting the American Republics due to the war, as well as those which might be submitted to it by the Consultation Meetings of Foreign Ministers or in Pan American Conferences.⁷ The Bogotá Conference then provided that the Committee should thereafter be the Permanent Committee of the Inter-American Council of Jurists⁸ and should undertake such studies and projects as might be duly assigned to it by any of four agencies enumerated therein.⁹

Three projects in particular have been adopted by the Committee for presentation to the Conference which ought to stimulate general interest. These are the studies dealing with the codification of international law, recognition of *de facto* governments, and the Inter-American Court to protect Human Rights.

In its draft resolution on the development and codification of international law, the Committee has provided the Council of Jurists with an over-all working plan which will encourage tangible progress in such fields as the Council may elect. The inevitable listing of topics considered most susceptible of codification¹⁰ seems almost at first view to reproduce the classical headings of a textbook on international law (subjects, sources, rights

⁶ Mr. Morris to the Secretary of State, July 12, 1949.

⁷ Resolution XXVI, adopted at Rio de Janeiro. See the Carnegie Endowment's *Conferencias Internacionales Americanas, Primer Suplemento* (1938-1942), p. 206, for text. The Inter-American Neutrality Committee had been established in 1939 for the purpose of formulating recommendations on neutrality problems presented by the European war. At Rio, it was adapted to the new circumstances resulting from American involvement in the war. For a study of the early history and activities of this body, see Fenwick, this JOURNAL, Vol. 35 (1941), p. 1; and *ibid.*, Vol. 37 (1943), p. 5.

⁸ Resolution II of the Conference (*cf.* Final Act, p. 8, and Arts. 68-69 of the Charter).

⁹ *E. g.*, the Council of Jurists, the Inter-American Conference, the Meeting of Consultation of Foreign Ministers, or the Council of the Organization. Charter, Art. 70.

¹⁰ Art. 4, Report of the Juridical Committee, p. 38.

and duties of states, recognition, territorial waters, non-recognition of forceful acquisition of territory, asylum, pecuniary claims, industrial property, and so on); but, far from being selected arbitrarily, these topics were chosen either because the American States had already made some effort in the past to codify them, or because many of them are regarded as of more immediate concern than numerous others. Finally, the Committee has recommended that scientific investigations be undertaken to perfect and advance existing international law on certain other questions: the international protection of the rights of man, war crimes, and the creation of an Inter-American Court of Justice.¹¹ In short, in the field of public international law, the program suggested follows the general method of approach used by the International Law Commission in the United Nations.¹²

On the other hand, for private international law the development of a thorough-going code acceptable to the whole Continent is recommended. As conceived by the Committee, this task would require the harmonization of the principal official and unofficial codes already in existence, namely, the Bustamante Code adopted at the Sixth Conference of American States at Havana in 1928;¹³ the Montevideo treaties approved by South American Congresses on Private International Law in 1889 and 1940; and the well-known Restatement of the Law of Conflicts of Laws of the American Law Institute.¹⁴ Thus, with respect to the codification of public international law, the technique adopted is better described as gradual and progressive; that for private international law, general and comprehensive.¹⁵ It is contemplated that the preliminary spadework of codification will be performed by the Committee, which will submit a first draft on given topics to the Secretary General of the Organization for distribution to the American Republics. Such changes or suggestions as the member governments may then propose will be communicated to the Committee, which will then prepare a second report to be submitted for approval to the Council of

¹¹ Art. 5, *ibid.*, p. 39.

¹² Report of the International Law Commission, General Assembly, Official Records, 4th Sess., Supp. No. 10 (A/925), p. 3; text in this JOURNAL, Supp., Vol. 44 (1950), p. 1.

¹³ See this JOURNAL, Spec. Supp., Vol. 22 (1928), p. 273.

¹⁴ Art. 6 of the Committee's draft, p. 39.

¹⁵ The distinction of method drawn between the two large fields of codification was unacceptable to the Mexican member of the Inter-American Juridical Committee, who argued, first, that merely listing a number of subjects as susceptible of codification was not a proper way to prepare a program (it happens to have been the procedure followed in the United Nations); and that, on the other hand, there was no point in talking about drafting a code of private international law, since the Bustamante Code of 1928 was already in existence. The fact that it had not been accepted by the United States was, in his view, indicative of the futility of further effort in that direction. (Report of the Inter-American Juridical Committee, pp. 42 ff.) Whether the basic differences between the civil and the common law systems will frustrate all measures to introduce some uniformity in legislation on this matter would seem, however, to warrant further study.

Jurists. In this entire program, provision is made for coordinating the efforts of both the Council and its Committee with the work of the International Law Commission of the United Nations; for an exchange of any preparatory documents and information that might be useful; and for the participation of observers from each agency in the sessions of the other.¹⁶

More specific observations are indicated with respect to the Committee's draft, commentary, and report on the recognition of *de facto* governments. The subject is one of enormous complexity principally because it is an amalgam of political and legal elements in a degree which is unusual even for international-law. In the Western Hemisphere these difficulties have been further overcast by a sensitiveness of the Latin Republics, whose history has been spotted with the emergence of one *de facto* government after another. For some of these régimes refusal of recognition by the United States has been fatal to their survival. Conversely, recognition has operated to strengthen a shaky government's internal position. Our southern neighbors have frequently denounced what they regard as an arbitrary use of the recognition process which, rightly or wrongly, they sometimes viewed as "intervention" in their domestic affairs. And from some quarters have come proposals to abolish the institution of recognition altogether.¹⁷

The Committee's draft recommends no such radical departure from the general practice of states in this field. Articles 1 and 2 provide as follows:

Article 1. A *de facto* Government has the right to be recognized when it satisfies the following conditions:

(a) effective authority over the national territory, based upon the acquiescence of the population, manifested in an adequate form.

(b) capacity and willingness to comply with the international obligations of the State.

Article 2. Recognition may not be granted as a means of obtaining any advantage (*ventaje alguna*) from the *de facto* Government, nor may it be subordinated to the acceptance of special requirements by the recognizing State, or made the subject of negotiation and compromise.

The element of effective authority in Article 1(a) is an orthodox postulate of general international law. But more is required than the mere seizure of governmental power, maintenance of authority by force and tyrannical suppression of the rights of the inhabitants. The régime must be rooted

¹⁶ Art. 17 of the Committee's draft, Report, p. 42.

¹⁷ See Resolution XXXIV adopted at the Inter-American Conference on Problems of Peace and War in 1945 (Mexico City), concerning the project presented by the Delegation of Ecuador. Report submitted to the Pan American Union, 1945 (Congress and Conference Series, No. 47), p. 66. See also the United States Delegation's Report on the Ninth International Conference of American States (Department of State Publication 3268), pp. 82 and 83.

in the will of the people, adequately manifested in some form or other—a tenet of American diplomacy (of sporadic distinction, however) since Thomas Jefferson. In the words of the Committee:

Although the form of this popular manifestation may vary according to the circumstances of each individual case, it is nevertheless indispensable that the new Government permit public opinion to be expressed freely and fully; in a word, that it give due respect for the exercise of the fundamental rights and freedoms of the human being. In this matter, the Committee has deemed it opportune to bring together the principles stipulated in the Charter of the Organization of American States relative to that fundamental duty of the State.¹⁸

Despite his substantial concurrence in the basic principles inspiring the draft, the United States member had a number of specific objections which constrained him to read into the *actas* a statement reserving his position thereon. In the first place, the formulation of conditions of recognition in terms of a right vested in the *de facto* government, aside from being of dubious practical desirability, necessarily implies a legal duty in other states to grant recognition. Adequate basis for any such duty is lacking in existing international law¹⁹ which, on the contrary, delegates to each state the faculty of determining if and when to grant recognition. That this faculty remains unimpaired by the draft hardly excuses scientific inaccuracy.

Likewise open to criticism is the principle enunciated in Article 2, which is stated so broadly (*ventaja alguna*) as to shrink, if not nullify, the essential protection of Article 1(b) under which compliance with international obligations may be required. Such compliance can justifiably be insisted upon under certain circumstances for the purpose of obtaining advantages to which the recognizing state is legitimately entitled.²⁰ Moreover, Article 3 of the draft (which would exclude non-recognition as a measure of sanctions or reprisals) might involve obligations inconsistent with those already assumed under the Charter of the United Nations, for states parties to that instrument may under appropriate conditions be bound to defer granting recognition. Nor, in the view of the present writer, is Article 4 (which declares recognition to be "irrevocable") deemed to warrant inclusion, either. This gratuitous affirmation ignores the well-established distinction between *de facto* and *de jure* recognition, and the right of a state under

¹⁸ Report of the Inter-American Juridical Committee on Recognition of De Facto Governments (Sept. 27, 1949), p. 24.

¹⁹ For a contrary view, *cf.* Fenwick, "The Problem of the Recognition of De Facto Governments," Inter-American Juridical Yearbook, 1948, p. 3, note (reprint). And see, generally, Jiménez de Aréchaga, *Reconocimiento de Gobiernos* (1947), Ch. 1, pt. C.

²⁰ The Report of the Committee accompanying this draft attempts to reduce the scope of the prohibition by asserting that recognition may not be used as an instrument for obtaining special privileges or unjustified concessions. But such an intention could have been more precisely worded in the draft.

international law to utilize one or the other of these classical methods as its view of the facts might determine. Here, however, legal arguments seemed to wilt in the face of extra-judicial factors of an imponderable but highly jealous character.

The outstanding feature of the draft is the provision for an interchange of information between the American Republics for the purpose of clarifying the factual situation presented by the appearance of a *de facto* government (Articles 6 to 9). On the request of any republic the others must "consider," before taking action on recognition, the desirability of exchanging such information as they may possess for the purpose referred to. The commitment is just about as restricted as any undertaking could be. Not only is there no obligation to proceed to an interchange of views (the only duty being to "consider"); but even after the procedure of consultation has been agreed upon—again, it must be noted, solely to assist the governments in ascertaining the facts—each government retains its plenary capacity to evaluate the situation disclosed and to determine what action it will take. To avoid any possibility of misconstruing the convention on this point, the United States member, before attaching his signature to the document, inserted in the record an emphatic denial that anything in the draft was to be construed as derogating from the principle that the ultimate granting or withholding of recognition in a given case is a decision within the exclusive appreciation of the recognizing state.

Resolution XXXI of the Ninth Conference of American States at Bogotá recommended that the Inter-American Juridical Committee prepare a draft statute for the creation and operation of an Inter-American Court to Guarantee the Rights of Man. The draft was then to be submitted for examination to the various governments, and ultimately presented to the Tenth Conference at Caracas, which was to consider whether the time was ripe for consummating it. From the very beginning of its deliberations on this delicate and perplexing question, the Committee was unanimously of the opinion that elaboration of such a statute at the present time was premature, if not technically impracticable. Two major obstacles in its view were the non-existence of positive (as distinct from "natural") substantive law which the Court would be directed to apply; and the elusiveness of any formula which, given the existing structure of the world community, would reconcile national claims to judicial autonomy with the paramount jurisdiction of an international tribunal.

The first of these may eventually be overcome by the conclusion and acceptance of an international treaty endowing all human beings with certain fundamental rights which must be respected by the contracting states and which an international court could then enforce. However, as a matter of sound juridical technique, it was not deemed possible to implement mere declarations on human rights, such as that adopted by

the General Assembly of the United Nations in 1948,²¹ or the somewhat differently oriented effort of the American Republics in that direction at Bogotá.²² These instruments did not create rights and obligations in positive international law, no matter how ardently may plead the advocates thereof.²³ They evidence tendencies, trends in the law, no more.

But even if this first difficulty be eliminated, the second obstacle will yield less readily. In a recent appraisal of the hard facts that must be faced before the problem can be approached intelligently, the Honorable Carl Rix has soberly brought into just focus some of the hazards for our own constitutional system, some of the very profound implications for the relationship of the state to the international community, in the current evolutionary urge to vest individuals with fundamental rights directly under the law of nations.²⁴ The distribution of competence between national and international court is only one of the thorny constitutional problems so presented; and the Juridical Committee found it impossible to ignore them or to dispose of them by hypothetically theorizing into being the statute for a proposed court even if the jurisdictional limits of such a court could be so hypothetically determined.

Consequently, the opinion of the Committee does not, it is true, respond to the mandate of Resolution XXXI, for no draft statute has been developed. Instead the Committee has presented its reasons for not executing the recommendation, and has tendered to the Council of Jurists the suggestion that acceptance of a formal convention on human rights is a necessary preliminary step before enforcement procedures can be soundly created. It will remain for the Council to decide whether this suggestion possesses any merit. But the experience of the Committee is a sharp reminder that before the lofty ideals of such a great movement can be realized, we must travel a tortuous path. Without positive norms of conduct incorporated in a binding international instrument, to implement an alleged cluster of human rights, no matter how solemnly proclaimed, would be tilting at invisible legal windmills. And even with acceptance of such a convention the ultimate and more important problem of guarantees to

²¹ Text in this JOURNAL, Supp., Vol. 43 (1949), p. 127. See General Assembly, 3rd Sess., Pt. I, Official Records (1948), pp. 875 ff. (debates); and the Annexes thereto, p. 535. Separate reprints of the Declaration are available as Department of State Publication 3381.

²² Resolution XXX of the Ninth Conference of American States, Final Act, pp. 38 ff.; this JOURNAL, Supp., Vol. 43 (1949), p. 133.

²³ See Simsarian in Department of State Bulletin, Vol. XXI, No. 523 (July 11, 1949), p. 3; and the introduction in Publication 3381 referred to above.

²⁴ 35 American Bar Association Journal (July, 1949), p. 551, and particularly at pp. 619 ff. A recent illustration of some of these implications was presented by the announcement of Mr. Paul Robeson that the prosecution and conviction of the eleven Communist leaders will be protested before the United Nations Commission on Human Rights. New York Times, Oct. 18, 1949.

vindicate those rights will tax our finest legal talent before a workable system may emerge which will reconcile claims to national sovereignty with the conscience of civilized peoples; which will harmonize existing constitutional orders with superior, overriding enforcement by an international organ. Here, as in other slow marches toward perfection in society, impatient mankind may be tempted to relinquish existing, tangible, proven gains for uncertain, impracticable solutions which appear to promise more. Perhaps this explains why, in some quarters, and often for disguised motives, a tumult is heard that the present system of diplomatic protection should be abolished in favor of an international protection of the rights of man.²⁵ There is no surer way to destroy the existing, limited benefits already provided by international law in this domain than through such folly. Unfortunately, as Mr. Rix points out, there has been far too glib and vocal acceptance of the general credo of human rights without adequate attention to practical realities. Some of the very countries that have been in the forefront of this movement will likely prove to be the last to accept a specific obligation impinging upon their national sovereignty, if their previous history is any criterion of predictability. Unless the nations on this planet seek to subscribe to empty phrases which must go unrealized, the progress must be made slowly, painfully, but determinedly, without losing sight of the truism that, whether we like it or not, national communities are not as advanced as some of us might wish them to be; different regions of the globe are in vastly disparate stages of political development; the dogma of sovereignty still diverts our course and obscures our vision; and in too large a portion of the earth's surface not only are fundamental rights for individuals away from their homeland a myth, but the subjects of many countries themselves are helpless against tyranny. For them, *habeas corpus* must be preceded by *habeas cadaver*, ere the grand design of a Bill of Rights for all men ceases to be a mirage.

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LEGAL CONTROL OVER RESIDENT ENEMY ALIENS IN TIME OF WAR
IN THE UNITED STATES AND IN THE UNITED KINGDOM

The category of resident enemy aliens includes all persons resident in the United States, but not citizens of the United States, who owe allegiance to a country with which the United States is at war, from the time of declaration of war until the war is terminated by a political act to be effected by a treaty, legislation, or presidential proclamation. This definition applies *mutatis mutandis* to the United Kingdom.

The relevant United States statute is the Alien Enemy Act¹ which applies only to persons 14 years of age or older who are within the United

²⁵ See the writer's "Recent Aspects of the Calvo Doctrine," this JOURNAL, Vol. 40 (1946), p. 121.

¹ 50 U.S.C., § 21 (1940).

States and not actually naturalized, and it is the authority for proceeding against dangerous enemy aliens and for the issuance of regulations governing their conduct. Under this statutory provision, which was first enacted in 1798 and amended in 1918 to apply to females as well as males, all "natives,² citizens, denizens or subjects" of any foreign nation or government with which the United States is at war, or which perpetrates, attempts or threatens any "invasion or predatory incursion" against the territory of the United States are liable to be "apprehended, restrained, secured and removed as alien enemies." The President has first to make a public proclamation to bring the statute into effect.³

An illustrative example of who is not a citizen of Germany came before the United States Circuit Court of Appeals in 1943 in *U. S. ex rel. Schwarzkopf v. Uhl*.⁴ This was a *habeas corpus* proceeding concerning a Jewish citizen of Austria who had voluntarily departed from that country in 1936 and had afterwards never elected to accept the sovereignty of the German Reich. The court recognized that in determining who are citizens of foreign nations within the meaning of the Alien Enemy Act, it must apply not only the municipal law of such nations but also "accepted rules and practices under international law." Under international law a state annexing another state can impose its citizenship by collective naturalization only upon persons who are inhabitants of the annexed state at the time of the annexation. If they have voluntarily departed and have never expressly or impliedly consented to the transfer of their allegiance to the new sovereign, it is not so transferred.⁵ Thus the court would probably have held on this ground alone that the relator, Schwarzkopf, had never become a German citizen despite the German decree of July 3, 1938, which conferred Reich citizenship on all Austrian citizens, and that, since Austria

² *U. S. ex rel. D'Esquivia v. Uhl*, 137 F. (2d) 903 (1943).

³ The legal consequences of the Trading with the Enemy Acts must be shortly distinguished. Under the Federal statute an "enemy" is defined by sec. (2) to mean any person of any nationality, resident within the territory of, or the territory occupied by, any nation with which the United States is at war. Under both this statute and the corresponding United Kingdom Trading with the Enemy Act, 1939 (and as amended), the test of "enemy character" is determined by residence and not by nationality. Thus in *Reising v. Dampfschiffahrts-Gesellschaft Hansa*, 15 F. (2d) 259, German citizens resident in the United States during World War II were held not to be "enemies of the United States" within the meaning of the Trading with the Enemy Act.

A paradoxical and unfortunate aspect of this statute may be seen in the recent case of *Okihara v. Clark*, 71 F. Supp. 319 (1947); this JOURNAL, Vol. 42 (1948), p. 224. A girl resident in Hawaii who was both an American citizen and a Japanese national sought to recover property in the hands of the Alien Property Custodian. The Court held that although "for most purposes while in the United States a dual citizen will be regarded as a United States citizen only," the plaintiff to recover under the Act had to allege and prove that she was not a "national of a foreign country." As she failed in this, the Custodian retained the property.

⁴ 137 F. (2d) 898 (1943).

⁵ Halleck, *International Law* (4th ed.), Vol. II, p. 506, *et seq.*

had ceased to exist as an independent state, he was a "stateless person." However, assuming the contrary for purposes of German municipal law, and considering whether the subsequent German order of November 25, 1941, which deprived Jews resident abroad of their German citizenship was effective to make Schwarzkopf a "stateless person," the court held that "there is no public policy of this country to preclude an American court from recognizing the power of Germany to disclaim Schwarzkopf as a German citizen." Thus he was not a citizen of Germany within the meaning of the Alien Enemy Act.

Similarly in *U. S. ex rel. Steinvorth v. Watkins*,⁶ the Circuit Court of Appeals in New York upheld the *habeas corpus* application of a person interned as an enemy alien. A former German citizen had opted for Costa Rican citizenship in 1941 by which option he became a citizen of Costa Rica and lost his German citizenship. In 1944 his Costa Rican citizenship was revoked by the Costa Rican authorities, and he was brought subsequently to the United States and detained as an enemy alien. The court held that though the validity of the Costa Rican action could not be attacked in United States courts, the revocation of Costa Rican citizenship did not restore the relator's German citizenship, and that therefore he could not be detained under the Alien Enemy Act.

Schwarzkopf v. Uhl may be distinguished from an English decision relating to the validity of the German order of November 25, 1941, which deprived Jews resident abroad of their German citizenship. The former was decided before the United States and Germany had declared war; however, the fact that the United Kingdom and Germany were already at war was the basis of the court's holding in *Rex v. Home Secretary ex parte L*.⁷ It is clear that English courts will not in time of war recognize any change of nationality brought about by a decree of an enemy state which purports to turn any of its subjects into a stateless person or a subject of a neutral state. Such a person under English law retains his enemy nationality.

Under English law there is no statutory basis required for the control of enemy aliens in wartime. This is a field where the powers of the Royal prerogative are still unlimited. Some enemy aliens, during the second World War, were interned under Article 18B of Defence (General) Regulations whereby the Home Secretary was given plenary discretionary powers unchallengeable by the courts.⁸ Others were detained under Article 12(b) of Aliens Order 1920 whereby the Home Secretary was empowered to detain people whom he would otherwise deport. But mainly the internment of enemy aliens was carried out under the Royal prerogative. The internment of enemy aliens is considered as an act of state and is thus not justiciable by the courts, and may also be based on the right of a belliger-

⁶ 159 F. (2d) 50 (1947); this JOURNAL, Vol. 42 (1948), p. 213.

⁷ [1945] 1 K.B. 7.

⁸ *Liversidge v. Anderson*, [1942] A.C. 206.

ent in international law. The prerogative powers with respect to enemy aliens remain unaffected by statutes; these have in fact expressly preserved the absolute prerogative powers. Thus every enemy alien remains within the realm under license from the Crown exercised as part of the Royal prerogative. Internment is not *per se* a revocation of the Crown's license, although in the nature of the case it revokes the enemy alien's license to remain at large.⁹ In such circumstances how far is an interned enemy alien entitled to a writ of *habeas corpus*? A clear answer was given in *Netz v. Chuter Ede*,¹⁰ which concerned a German national who was interned in 1940 and who was challenging the validity of a compulsory deportation order. The court only considered the question whether Netz was an enemy alien, and ruled in the affirmative, holding that he was within the realm solely under license from the Crown, which the Crown, exercising its prerogative power, had withdrawn, and that since the act complained of was an act of state, it was nonjusticiable.

Another recent case is *Rex v. Bottrill, ex parte Kuechenmeister*,¹¹ which has the authority of the Court of Appeal. This again concerned a German national, who was interned as an enemy alien, but who contended that at the time of his application for a writ of *habeas corpus*, he was only an alien, hostilities against Germany having terminated by the unconditional surrender of June, 1945. However, the executive submitted a declaration that a state of war still existed, which was conclusive upon the court¹² as to the matters it purported to certify, and the applicant's contention was rebutted. Thus the applicant remained an enemy alien and, as such, not entitled to a writ of *habeas corpus*. The court also held that it was irrelevant to the issue whether he was a prisoner of war or not, since as an enemy alien he was unable to challenge the right to control him which under the constitution was vested in the discretion of the King.

Essentially the courts of the United States have followed a similar line of decisions. Regarding all the cases dealing with internments and deportations of enemy aliens the only question which is justiciable is whether or not the petitioner is an enemy alien within the provisions of the Alien Enemy Act and the presidential proclamations.¹³ In *Minotto v. Bradley*¹⁴ it was held that an enemy alien arrested under the Alien Enemy Act could not raise the objection that he was deprived of his liberty without due process of law.¹⁵ Nor did the presidential warrant on which the arrest

⁹ *Schaffenus v. Goldberg*, [1916] 1 K.B. 284.

¹⁰ [1946] 1 All Eng.R. 628.

¹¹ [1946] 2 All Eng.R. 434.

¹² *Jansen v. Driefontein Consolidated Mines*, [1902] 2 A.C. at 500; and *cf. Ludecke v. Watkins*, 335 U.S. 160 at 170 (1948); this JOURNAL, Vol. 42 (1948), p. 937.

¹³ But see the vigorous dissent of Douglas, J., with Murphy and Rutledge, J.J., concurring, from this proposition in *Ludecke v. Watkins*, 335 U.S. at 184.

¹⁴ 252 Fed. 600 (1918).

¹⁵ *Cf. Wong-Wing v. U. S.*, 163 U.S. 228 (1896), for a discussion of the application of the "due process" clause of the 14th Amendment to aliens in time of peace.

was made need to disclose the grounds on which the alien was taken into custody. If the President were required to disclose the basis for his warrant, the entire purpose of the statute might be frustrated. The power to assure national safety during wartime is a necessary incident of sovereignty. Thus the President's determination as to the danger involved in the conduct of enemy aliens and as to the measures necessary to combat such dangers are not subject to judicial review. The President's action is conclusive.

Barring questions of interpretation, therefore, and of constitutionality, the Alien Enemy Act is not subject to judicial review. On this latter point the Appeals Court of the District of Columbia made the following comment in 1946:

The Alien Enemy Act is constitutional both as an exercise of power conferred upon the Federal Government and as a grant of power by the Congress to the President.¹⁶

In 1948 in *Ludecke v. Watkins*¹⁷ the application of the statute came before the Supreme Court, which divided 5 to 4 on the issue. This case concerned a German enemy alien who sought a writ of *habeas corpus* for release from detention under a deportation order made under the Alien Enemy Act, upon a finding by the Attorney General that he was dangerous to the public peace and safety. This finding, which was an exercise of power delegated to the Attorney General by the President to provide for the removal from the United States of enemy aliens deemed by him to be dangerous, was held to be no more subject to judicial review than if the power conferred upon the President by the Alien Enemy Act had been exercised by the President himself. The Court further held that the war powers¹⁸ of the President are not exhausted even though active hostilities have ceased; and also accepted as nonjusticiable the declaration by the Executive that "a state of war still exists." Thus so applied, the Alien Enemy Act was not a denial of due process of law. Black, Douglas, Murphy, and Rutledge, J.J., dissenting, held that the technicalities of the "fictional war" should be inapplicable to the deportation of enemy aliens. The English court in *Rex v. Bottrill* did not so divide. For most matters

¹⁶ *Citizens Protective League v. Clark*, 155 F. (2d) 290 (1946); and the Supreme Court in *Ludecke v. Watkins*, 335 U.S. at 171, said: "The Act is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights."

¹⁷ 335 U.S. 160 (1948).

¹⁸ It was stated in *Stewart v. Kahn*, 11 Wall. 493 at 507 (1870), that the war power "carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress." And the Supreme Court in *Woods v. Miller*, 333 U.S. 138 at 141 (1948), upholding the continuation of rent control in the Housing and Rent Act of 1947, said that: "whatever may be the consequences when war is officially terminated, the war power does not necessarily end with the cessation of hostilities."

of a private nature, such as provisions in wills and the like, the cessation of actual hostilities has meant the termination of World War II. For public purposes strict abidance by the rules of technical termination is essential, but it would seem questionable whether their application to the present field is entirely justified. At any rate there might well be a delimitation of the "fictional" extent of war, to a definite period after the conclusion of hostilities.

Douglas, J., with the concurrence of Murphy and Rutledge, JJ., dissented also on the grounds that for the purposes of review on *habeas corpus*, the deportation of an enemy alien is no different from any other deportation proceeding, and, whether in peace or war, is subject to the same due process requirements of reasonable notice, fair hearing, and an order supported by some evidence. When war is in progress *de facto* and not merely *de jure* this view would seem to be unjustified.

In conclusion we may note that there is more than a tendency both in the United States and in the United Kingdom for the courts to coöperate with the executive in precluding themselves from judicial inquiry into acts taken in respect of resident enemy aliens in time of war. Clearly this is one of the fields in which the tendency is not to be deplored. With due regard for the requirements of "total war," it is indeed doubtful whether it can be seriously maintained that the resident enemy alien is particularly jeopardized by the respective legal powers of the governments. In all cases it is a question of prosecuting a successful war and taking no chances with "dangerous" or "doubtful" enemy aliens, rather than of exercising too many scruples over constitutional provisions and safeguards. In such matters it is best to err on the severe side; legal laxities in time of war reap little reward.

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NEW CZECHOSLOVAK LEGISLATION ON ACQUISITION AND LOSS OF NATIONALITY

By a most recent statute (Law of July 13, 1949 Concerning Acquisition and Loss of Czechoslovak Nationality, Collection of Laws of the Czechoslovak Republic No. 194, published on August 10, 1949 and effective as of October 1, 1949),¹ basic changes were brought about in that country's nationality law.

When, in 1918, the Austro-Hungarian Monarchy fell apart, the new Czechoslovak Republic inherited a legal system of nationality that, in the western (former Austrian) part of the country (Bohemia, Moravia, Silesia), was based on the following principles of Austrian law:

(a) Acquisition of nationality (citizenship) takes place *jure sanguinis*:

* The views expressed are the personal views of the author.

¹ For translation of text, see Supplement to this JOURNAL, p. 77.

i.e., the child of a national father (or an illegitimate child of a national mother) is *ipso jure* a national; the child of an alien father (or the illegitimate child of an alien mother) is a foreigner; the (domestic or foreign) place of birth is immaterial.

(b) If a national marries a woman of foreign nationality she becomes, *ipso jure*, a national; if a woman national marries a foreigner, she loses, *ipso jure*, her nationality.

Between the two world wars, in the young Czechoslovak Republic, the law of acquisition and loss of nationality was the subject of rather comprehensive legislation (by Statute of April 9, 1920, Collection No. 236); that new legislation, however, did not change anything in the adherence to the principles as outlined in the preceding paragraph.

After the second World War, in the reestablished Czechoslovak Republic, a Statute of May 29, 1947 (Collection No. 102), was enacted that must be considered as a first deviation from the principles on which, up to that time, the law of nationality had been based. By that statute it became the law that the foreign bride acquires Czechoslovak nationality by marrying a Czechoslovak national only if the Ministry of Interior, on her application, consents to her acquiring Czechoslovak nationality. Thereby the old rule pursuant to which the wife of a Czechoslovak national was necessarily, *ipso jure*, also a Czechoslovak national, came to an end and naturalization by administrative grant became the only way open to the foreign wife of a Czechoslovak national; such grant of nationality may, aside from marrying a Czechoslovak national, be applied for by any foreigner, and it is entirely in the discretion of the administration whether application will be granted or denied. Application by the bride was possible before or within three months after the marriage; nationality, if granted after marriage was, by a specifically enacted legal fiction (*praesumptio juris et de jure*), to be considered as granted retroactively as of the day of marriage.

On the other hand, pursuant to the same statute of 1947, a Czechoslovak woman national who marries a foreigner loses her Czechoslovak nationality if the law of the husband's country makes her a national of that country by her marriage, provided that she does not obtain from the Czechoslovak Ministry of Interior, on application made prior to or within three months after such marriage, a decree whereby her Czechoslovak nationality is preserved.

Thus, in 1947, a new element of administrative discretion was introduced into the field of the law of nationality, as far as intermarriage between nationals and foreigners was concerned.

The scope of the new law of July 13, 1949, is broader. It covers the field comprehensively and deals with the acquisition of nationality by birth, by marriage and by grant; and with the loss of nationality by marriage, by release and by forfeiture. This time there is preserved still less of the in-

herited prewar principles on which the law of nationality had been based. The provisions of the new law are subdivided as follows:

Part One. Acquisition of nationality.

(1) By birth: For the first time, Czechoslovak legislation is not based exclusively on the principle of *jus sanguinis*; an element of *jus soli* is admitted inasmuch as a child born in Czechoslovakia is, under the new law, a Czechoslovak national, if at least one parent is a Czechoslovak national; a child born abroad is a Czechoslovak national if both parents are Czechoslovak nationals (here the law follows the old rule of *jus sanguinis*). A child born abroad of parents of whom one only is a Czechoslovak national, becomes a Czechoslovak national only upon application filed within one year after birth and granted in the discretion of an administrative agency (here, in substance, *jus sanguinis* is denied by the legislature; discretionary grant would be possible anyway).

(2) By marriage: The principle as introduced in the law of 1947 is reenacted; instead of the older rule of *ipso jure* acquisition of nationality by marriage, we find again the element of administrative discretion. Pursuant to the new law, jurisdiction is in the lower administrative agencies and application is limited by a six months' deadline.

(3) By grant: The Ministry of Interior may, in its free discretion, grant nationality to applicants who have not committed any offense against the Czechoslovak Republic or its system of the "people's democracy." Aside from this negative requirement, the new law sets up two additional conditions; provides, however, that the Ministry of Interior may grant nationality also in their absence. The conditions are:

- (i) continuous five years' Czechoslovak residence; and
- (ii) loss of foreign nationality at the time of acquisition of the Czechoslovak one.

It is worth noting that that type of legislation enumerating the conditions for a grant of nationality is without precedent in Czechoslovakia. The Republic had inherited from Austria a system of granting nationality as a matter of grace which was not bound by any statutory law; the new five years' residence requirement appears to be copied from Anglo-American statutes. Of a foreign couple, either party may be granted nationality independently. This is new law.

Part Two. Loss of nationality.

(1) By marriage: The law as it was effective since 1947 (see above) is reenacted, with minor changes.

(2) By release: Of a Czechoslovak couple, either party may be released on application independently; this is also new law.

(3) By forfeiture: From the wording of the law it appears that the Ministry of the Interior may decree forfeiture in two groups of instances: the first group of provisions appears to be of a penal character and is expressly declared to be applicable only if the addressee is abroad; forfeiture may, pursuant to these provisions, be decreed if the national acted or acts in a way hostile to the state or potentially detrimental to its interest; or if he illegally left the country; or if he disobeys an order to return from abroad within a statutory period of time. The second group, not of a penal character, consists in the fact of dual nationality; the Ministry of Interior may declare the Czechoslovak nationality of a mixed subject as forfeited; it seems that for this second group there is no legal requirement of residence abroad.

Parts Three and Four.

These contain jurisdictional and general provisions; one of the final sections contains a saving clause whereby a law of April 29, 1930 (Collection No. 60), is preserved as unaffected by the new law. The law of April 29, 1930, was enacted to execute the Treaty between the United States and Czechoslovakia of July 16, 1928 (46 Stat. 2424).

PAUL REINER

THE FULBRIGHT ACT IN OPERATION

Attention was drawn some time ago to the possibility of utilizing the potentialities of the Fulbright program for the purpose of furthering basic research in international law.¹ In the meantime the program has been launched and it may be useful to indicate the main lines of development to date.

As of November, 1949, fourteen Executive Agreements were in force with the following countries: Australia, Belgium and Luxembourg, Burma, China, Egypt, France, Greece, Iran, Italy, The Netherlands, New Zealand, Norway, Philippines and the United Kingdom. Anticipated are agreements with six more countries: Austria, India, Korea, Pakistan, Thailand and Turkey.² Details concerning opportunities for visiting lecturers and advanced research scholars were made known by the Conference Board of Associated Research Councils designated by the Department of State as a co-operating agency to advise the Department and the ten-man Board of Foreign Scholarships established pursuant to the Fulbright Act. It appears from the announcements of the Conference Board that for the academic year 1950-51 there were offered in Belgium, the Belgian Congo and in Luxembourg one award for a visiting lecturer and two awards for ad-

¹ See this writer's note, "Research in International Law and the Fulbright Act," in this JOURNAL, Vol. 42 (1948), pp. 644-646.

² An agreement between the United States and Turkey was signed Dec. 27, 1949 (Department of State Bulletin, Vol. XXII, No. 549 (Jan. 9, 1950), p. 65); and one with India on Feb. 2, 1950 (*ibid.*, No. 554 (Feb. 13, 1950), p. 243).

vanced research scholars; in Burma, ten awards for visiting lecturers and two awards for advanced research; in France, ten awards for visiting lecturers and twenty-nine awards for advanced research; in Greece, four awards for visiting lecturers and six awards for advanced research; in Italy, fifteen awards for visiting lecturers and twenty for advanced research; in The Netherlands, ten awards for visiting lecturers and two for advanced research; in New Zealand, two awards for visiting lecturers and two for advanced research; in Norway, ten awards for visiting lecturers and ten for advanced research; in the Philippines, nine awards for visiting lecturers and two awards for advanced research scholars; and in the United Kingdom, five awards for visiting lecturers and twenty-four for visiting lecturers or advanced research scholars. In addition five awards were offered for visiting lecturers or advanced research scholars in British colonial dependencies, and ten awards to persons whose training or present activity may not conform to the traditional academic pattern. No information was available concerning opportunities in Australia, China, Egypt and Iran. The number of positions available in the different countries as given above need not be considered final, as the situation is kept somewhat flexible. Also no sharp distinction need be made between visiting lectureships and research awards as the former will have opportunity for research, while the latter will have occasion to give some lectures. The awards, to be announced by the Department of State in April or May, will be made in the currency of the participating country normally for a period of one academic year,³ with the possibility of extension. They will include, in addition to a stipend, round-trip transportation, a cost-of-living allowance, and a small supplemental allowance for local travel or the purchase of books or equipment.⁴

³ The Report on Public Meeting of the Board of Foreign Scholarships, March 30, 1949, Cleveland, Ohio, states:

"Awards to graduate students will be made only for a full academic year. In the case of professors, teachers, and research scholars, exceptions will be made to provide awards for shorter periods, notably in connection with teaching in recognized summer schools or for one semester during the regular sessions of approved institutions, and writing projects involving research or observation of not less than three months' duration."

⁴ The Conference Board of Associated Research Councils declared that in general, the following formula is used as the basis for arriving at the total amount included in an award:

"a. A basic living allowance is provided which approximates \$5,000 for those in the status of professors, associate professors or assistant professors and \$4,000 for those in the status of instructors. These amounts are merely index figures and are subject to changes in exchange rates and living costs varying from country to country.

"b. The award may also include a supplemental cost-of-living allowance adjusted to living costs in the country of residence and to the number of dependents accompanying the grantee. It is anticipated that a limited number of dependents will normally accompany grantees in the categories of visiting lecturers and research scholars. The supplemental cost-of-living allowance is intended in conjunction with the basic allowance to cover the expenses of the grantee and his family on a scale commensurate with his position, without unwarrantedly emphasizing differences which may exist between what the grantee receives and the salaries of his foreign colleagues.

The Conference Board's announcements, issued on October 15 and November 1, 1949, and inviting applications by midnight, November 30, 1949—a remarkably short period of time, which was extended to December 31, 1949, in the case of a few countries⁵—were fairly specific about institutions available to visiting lecturers and research scholars. This need not detain us here. More important is the listing of the fields or subjects. Some of the announcements are quite specific in this matter and the following subjects or fields may be mentioned at random: Mathematics, Physics, Chemistry, Engineering, Sociology, American Literature and Civilization, Archeology, Anthropology, Dentistry, Astronomy, etc. Law is specifically mentioned in connection with the United Kingdom and Italy, and one visiting lectureship was listed in international law, namely, at the University of Leiden, The Netherlands. It should be stressed, however, that the specifications regarding lectureships and advanced research awards are not always exhaustive and applications in other fields would be acceptable. As a rule any qualified United States citizen may apply.⁶ Presumably, however, when specifications of available opportunities are indicated, preference will be given to applicants who possess the necessary or desired qualifications.⁷

"c. Round-trip transportation is normally provided the grantees from the port of embarkation in the United States to the point of destination and return. Transportation costs within the United States will be paid whenever the respective foreign currencies can be used for this purpose. Transportation of dependents is not separately provided, but arrangements may sometimes be made for the purchase of passage for dependents in foreign currencies, the cost being subsequently deducted from the award in order to spare the grantee the necessity of expending dollars.

"d. A special allowance for incidental expenses, ordinarily not to exceed the equivalent of \$500, will be provided as needed and justified to take care of such expenses as equipment, secretarial assistance, or local travel in connection with the assignment." See Information Concerning United States Government Grants to Visiting Lecturers and Research Scholars under Public Law 584, Seventy-ninth Congress (The Fulbright Act), dated Oct. 15, 1947, pp. 5-6.

⁵ Burma, Greece, Italy, Philippines and the United Kingdom Colonial Dependencies and Special Category Awards.

⁶ Necessary qualifications are described by the Department of State as follows:

"A guiding principle in the selection of candidates for grants under the Fulbright Act is that candidates possess the abilities and personal characteristics which will enable them to develop a true understanding of the people in the host country and, upon their return, to communicate an honest impression of this experience to their fellow citizens.

"The field of study, teaching, or research which is proposed by applicants for these grants is of secondary importance in the selection process. However, the educational resources which exist in a given country may be such as to encourage academic work in certain special fields and not in others. The field of study and the type of experience which the candidate indicates in his project proposal are therefore important elements in the process of selection. In all cases, grants under the act are awarded on the basis of broad competition initiated through wide public announcement." Educational Exchanges under the Fulbright Act (Department of State Publication 3657, International Information and Cultural Series 9, December, 1949), pp. 7-8.

⁷ Application forms for the United Kingdom and British Colonial Dependencies, Belgium and Luxembourg, France, Greece, Italy, The Netherlands, Burma, the Philippines, New Zealand and Norway, for the academic year 1951-52 will be accepted by the Conference Board Committee in the late summer or early autumn, when the programs for

In the program as it has evolved so far there seems little demand or opportunity for lecturers or research scholars in the fields of international law and relations, comparative law and government, etc. The "ultimate purpose" of the program, declares the Conference Board, "is to further international goodwill and understanding between the United States and other countries."⁸ If this is the objective, it is difficult to see why applicants in the named and related fields receive no more encouragement. Certainly this cannot be explained on the ground that the facilities for the pursuit of research in countries like Italy, France, the United Kingdom, The Netherlands, Belgium, Norway, and others are not adequate. Moreover, one of the criteria for the consideration of projects is "immediate and subsequent use of the knowledge acquired and possible benefit to the United States or the host country."⁹ Surely it could not be successfully argued that research projects in the fields of international law and relations, comparative law and institutions and politics would not be of benefit to the United States and the host country.

The process for determining country programs, within the available funds, is not entirely clear. From information issued by the Conference Board it appears that in each participating country there is an administrative agency called United States Foundation or Commission. These Foundations or Commissions, generally composed of an equal number of American citizens and citizens of the participating country and representing cultural and business interests, are "responsible for proposing annual exchange programs for their respective countries. These programs list specific teaching opportunities for American citizens and indicate the number of students and research scholars who can be accommodated." The Commissions or Foundations "also arrange or verify institutional connections for candidates recommended to the Board of Foreign Scholarships," the coördinating agency under the Fulbright Act. Country programs are apparently reviewed by the Conference Board, one of the designated cooperating agencies in this country, which generally is in charge of visiting lecturers and advanced research scholars.¹⁰ One of the functions of the Conference

that year are available. At that time application forms and information concerning the programs will be sent to those interested in applying for an award. No programs have yet been initiated in Australia, Egypt, Iran, Turkey and India. Application forms and other necessary information will be sent to interested individuals as soon as programs are inaugurated in those countries.

⁸ See Information (*supra*, note 4), p. 1.

⁹ Other criteria for the evaluation of projects are: "(2) particular aspects of the project which make it necessary or distinctly desirable to be carried out in the proposed host institution; (3) possible contribution to or coordination with other educational, scientific or cultural programs of the United States; (4) academic or professional soundness of the project." See Report on Public Meeting (*supra*, note 3), p. 7.

¹⁰ "The Conference Board of Associated Research Councils is a joint agency of the American Council on Education, the American Council of Learned Societies, the National Research Council and the Social Science Research Council. . . . It carries out its

Board is to advise "the Department of State and the Board of Foreign Scholarships on possible changes which might achieve a better balance between the interests of the foreign country and the United States."¹¹ The selection both of the individuals and the institutions to which they are to be attached is made by the Board of Foreign Scholarships.

No information is available regarding the distribution of successful applicants among the different disciplines and fields of study. The country programs summarized above clearly indicate that in the fields of international law and relations or of comparative law and institutions, there are very few opportunities for American scholars. Whether this is due to lack of interest in the participating countries or other reasons cannot be determined on the basis of existing information. It must be borne in mind, however, that the country programs are flexible and that much room is left to individual initiative in making his own connections abroad with the assistance, when indicated, of the local Foundation or Commission.

No scholar should feel discouraged if his special field is not mentioned in a country program. On the other hand, it might be worthwhile to inquire whether more adequate opportunities could not be created for scholars in the international or comparative law fields. This matter would seem important enough to deserve consideration by the American Society of International Law and the Conference of Teachers of International Law and Related Subjects, which has not met since 1946. Appropriate action by these bodies or either of them might well lead to the exploration, in co-operation with the Conference Board or other agencies, of more intensive programs in the fields in which they are interested. In this connection it might perhaps be found convenient to raise the question whether it would be at all feasible or desirable to utilize such opportunities as will develop for the purpose of stimulating or carrying out a program of coördinated research in the field of international law and relations.

LEO GROSS,

Fletcher School of Law and Diplomacy

A NEW SCANDINAVIAN JOURNAL OF INTERNATIONAL LAW

In an effort to keep his survey of the present status of foreign periodical literature on international law (in this JOURNAL, Vol. 43 (1949), pp. 503-509) up to date, this writer wants to make known the contents of a letter, written by Dr. Meister of the Max Planck Institute at Heidelberg to this JOURNAL: The German *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, of which the last number received in this country was Vol.

responsibilities through an eight-man Committee (two representatives from each Council) with a secretariat attached for administrative purposes to the National Research Council which is the operating agency of the National Academy of Sciences." See Information, *supra*, note 4.

¹¹ All quotations from Information, *supra*, note 4.

9, No. 3, October, 1939, was published in Germany during the war until 1944. The Max Planck Institute will resume its publication in the very near future.

To the one well-established Scandinavian Journal of International Law (*Nordisk Tidsskrift for International Ret*) has recently been added a new Scandinavian journal. It is the *Jus Gentium, Nordisk Tidsskrift for Folkeret og international Privatret* (Copenhagen: Einar Munksgaard; annual subscription 25 Dan. Cr.). The Editor-in-Chief is the well-known Danish professor of international law and philosophy of law, Alf Ross. All the four Scandinavian countries are represented on the Board of Editors: Denmark by Max Sørensen, Iceland by H. G. Andersen, Norway by Frede Castberg and Sweden by Torsten Gihl. The articles by Scandinavian authors are printed in the Scandinavian languages or English; contributions by foreign writers may be in English, French or German. *Jus Gentium* is issued four times yearly. Volume I, number 1, was published in 1949. This number makes an excellent impression. Apart from book reviews, reports and two important judicial decisions, it contains six articles, all extremely interesting. Sørensen writes upon the advantages and disadvantages of the functional principle in international organization, Erik Dons (Norway), on human rights and the problem of domestic jurisdiction. Algot Bagge defends the idea that the legal position of the Powers now occupying Germany is simply that of belligerent occupation under the Hague Regulations concerning War on Land. Torsten Gihl discusses Swedish neutrality practice in the two world wars. These four articles are in the Scandinavian languages. To the first three—but not the last one—is annexed an excellent summary in English. It would be desirable to add such summary in English to all the articles.

There are, further, two articles in English: The first three years of the International Court of Justice are discussed by its Registrar, Edvard Hambro. The number opens with a highly interesting and important study on "Denmark's Legal Status during the Occupation," by Alf Ross.

JOSEF L. KUNZ

21ST SESSION OF THE HAGUE ACADEMY OF INTERNATIONAL LAW

The twenty-first annual session of the Academy of International Law will be held at The Hague this summer, beginning on July 17 and continuing for four weeks. The course will consist of three lecture periods each morning for five days a week and one or two afternoon seminar sessions. Lectures are delivered in either English or French. The provisional program includes a general course of ten lectures on principles of public international law by Senator Henri Rolin, President of the Law Faculty of the Free University of Brussels, as well as lectures on the following subjects: "The Conception of the State and of Established Order in China," by A.

Bonnichon, Dean of the Law Faculty, Aurora University, Shanghai; "Politics and International Law," by A. de Luna, Professor of International Law, University of Madrid; "International Organizations and the Law of Responsibility," by Clyde Eagleton, Professor of International Law, New York University; "Post-War Problems of International Law Pertaining to Private Property," by Manfred Lachs, Head of the Juridical Department, Ministry of Foreign Affairs of Poland; "The Status of Foreigners in Egypt," by Hamed Zaki, Professor at the Law Faculty, Royal University of Cairo; "Co-ordination of the Different Organs of the United Nations," by C. Wilfred Jenks, Assistant Director, International Labor Organization; "Crimes Against Humanity," by Jean Graven, Professor at the Law Faculty, University of Geneva; "The Red Cross and the Geneva Conventions," by Jean S. Pictet, Director, International Red Cross Committee, Geneva; "Agreements on Trusteeships," by G. Vedovato, Professor of International Relations, Faculty of Political Sciences "Alfieri," Florence; "The Jurisdiction of the International Court of Justice," by Edvard Hambro, Registrar of the International Court of Justice; "International Control," by L. Kopelmanas, of the *Centre National de la Recherche Scientifique*, Paris.

The facilities of the Academy are offered to those who already have some background in international law and wish to improve their knowledge. The conditions of admission are not rigid, and no tuition fee will be charged for the 1950 course. The Managing Board of the Academy passes upon applications for admission to the courses. Application forms may be obtained from the Secretariat of the Board, Room 50, Peace Palace, The Hague.

INTERNATIONAL LAW ASSOCIATION MEETING

The 44th Conference of the International Law Association will be held in Copenhagen, Denmark, from August 27 to September 2, 1950. The sessions will be held in the Houses of Parliament, beginning on Sunday, August 27. Among the subjects on the tentative program of the conference are: Nationality and Statelessness, Rights to the Sea-Bed and Its Subsoil, Development and Codification of International Law, Sovereign Immunity, Corporations Engaged in International Business, and Air Law. The closing session on Saturday, September 2, will be devoted to the promulgation of the projected York-Antwerp Rules of 1950.

The Danish Branch of the Association has arranged an elaborate program of entertainment for the members attending the sessions which includes a reception by the City of Copenhagen, a banquet by the Danish Branch, and a special performance in the Royal Theater.

Members of the American Branch of the Association who plan to attend the Conference should communicate with Mr. John J. Abberley, Secretary, 55 Liberty Street, New York 5, N. Y.

E. H. F.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD NOVEMBER 1, 1949—JANUARY 31, 1950

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *C.I.E.D.*, Chronology of International Events and Documents, Royal Institute of International Affairs; *Cmd.*, Great Britain Parliamentary Papers by Command; *D.S.B.*, Department of State Bulletin; *D.S.P.R.*, Department of State Press Release; *F.A.O.*, Food & Agriculture Organization; *G.A.(IV)O.R.*, U.N. General Assembly Official Records, 4th session; *G.B.M.S.*, Great Britain Miscellaneous Series; *G.B.T.S.*, Great Britain Treaty Series; *I.B.R.D.*, International Bank for Reconstruction and Development; *I.C.J.*, International Court of Justice; *I.L.O.*, International Labor Organization; *I.R.O.*, International Refugee Organization; *L.T.*, London Times; *N.Y.T.*, New York Times; *T.I.A.E.*, U. N. Treaties and International Agreements Registered; *T.I.A.S.*, U. S. Treaties and Other International Acts Series; *U.N.B.*, United Nations Bulletin; *U.N.E.S.C.O.*, United Nations Educational, Scientific and Cultural Organization; *U.N.P.R.*, United Nations Press Release; *W.H.O.*, World Health Organization.

GENERAL *

April, 1949

- 14 JAPAN—UNITED STATES. Signed at Tokyo Agreement and Agreed Terms of Understanding on Awa Maru claim. Text: *T.I.A.S.* 1911.

June, 1949

- 25 POLAND—SWITZERLAND. Agreed by exchange of notes to turn over to Poland funds placed in Swiss banks, etc., by Polish Jews who died without heirs during war. *N.Y.T.*, Dec. 7, 1949, p. 26.

August, 1949

- 23—December 19 WAR CRIMES. British Military Court in Hamburg tried Field Marshal von Mannstein. *N.Y.T.*, Aug. 24, 1949, p. 4; Dec. 17, p. 6. Found guilty on 9 charges out of 17. Sentenced to 18 years' imprisonment. *N.Y.T.*, Dec. 20, pp. 1, 19; *L.T.*, Dec. 20, p. 4.

October, 1949

- 22—31 SOUTH PACIFIC COMMISSION. Held 4th session at Noumea, New Caledonia. Proceedings: *Its Doc.* SPC.4/Sec.33/Rev. 1.
- 26 IRAN. Announced official resumption of name Persia. *C.I.E.D.*, Oct. 20/Nov. 2, 1949, p. 724.

November, 1949

- 1 FINLAND—UNITED STATES. U. S. paid \$5,574,739.27 settling claims for requisitioned Finnish vessels in U. S. ports. *D.S.B.*, Nov. 21, 1949, p. 790.

* See p. 402 below for United Nations and Specialized Agencies; also p. 405 and following for Multipartite Conventions.

November, 1949

- 2/January 5, 1950 PEACE TREATIES. Hungarian note to U. K. and U. S. rejected charges of violating human rights provisions of Italian peace treaty. *C.I.E.D.*, Oct. 20/Nov. 2, 1949, p. 719. U. S. notes asked Hungary, Bulgaria and Rumania to name representative to proposed treaty commissions to study U. S. charges. Edwin B. Dickinson named U. S. representative on each commission. Text of U. S. note to Rumania; *D.S.B.*, Jan. 16, 1950, p. 97. Similar notes sent by U. K. to all 3, and by Canada to Hungary and Rumania. *L.T.*, Jan. 7, p. 5.
- 3-9 COUNCIL OF EUROPE. Committee of Ministers and Standing Committee met in Paris, Nov. 3-5 and Nov. 7-9, respectively. Considered admission of German Federal Republic and the Saar as associate members. *C.I.E.D.*, Nov. 3/16, 1949, p. 742; *N.Y.T.*, Nov. 10, pp. 1, 4. Report on meetings: *G.B.M.S.* No. 16 (1949), *Cmd.* 7838.
- 3-23 CHINA (Communist)—UNITED STATES. U. S. protested detention of its consular staff at Mukden. Text: *D.S.B.*, Nov. 21, 1949, pp. 759-760. U. S. note of Nov. 21 asked 30 nations to protest. *N.Y.T.*, Nov. 22, p. 1. Text: p. 8; *D.S.B.*, Nov. 28, pp. 799-800. Staff released and ordered to leave country. *N.Y.T.*, Nov. 24, p. 1.
- 3-December 27 EDUCATIONAL EXCHANGE. Egypt, Australia and Turkey signed at Cairo, Canberra and Ankara, respectively, agreements with U. S. providing exchanges authorized by Fulbright Act. *D.S.B.*, Nov. 28, 1949, p. 831; Dec. 5, p. 870a; Jan. 9, 1950, p. 65; *N.Y.T.*, Nov. 27, p. 31; Dec. 28, p. 5.
- 5 HUNGARY—YUGOSLAVIA. Announcement of Hungarian denunciation of frontier agreement of Aug. 3, 1949. *C.I.E.D.*, Nov. 3/16, 1949, p. 768.
- 7/December 21 WESTERN EUROPEAN UNION. Consultative Council held 7th session in Paris. Signed 2 multilateral conventions on social security. Text of official statement: *L.T.*, Nov. 8, 1949, p. 4. Members signed agreement in London exempting their troops from travel restrictions. *C.I.E.D.*, Dec. 19, 1949/Jan. 4, 1950, p. 27; *N.Y.T.*, Dec. 22, p. 19.
- 8 CAMBODIA—FRANCE. Signed treaty in Paris defining new status of Cambodia as an independent state within the French Union. *L.T.*, Nov. 9, 1949, p. 3.
- 9 GERMANY (Democratic Republic). Volkskammer voted full civil and economic rights to former Nazis and militarists. *N.Y.T.*, Nov. 10, 1949, p. 1.
- 9-11 GERMAN OCCUPATION. Messrs. Bevin, Acheson and Schuman met in Paris to discuss common Allied program toward Germany. *N.Y.T.*, Nov. 10, 1949, p. 1; Nov. 11, pp. 1, 6. Text of communiqué: p. 6; *D.S.B.*, Nov. 28, p. 822. Text with annex: *Germany* No. 4 (1949), *Cmd.* 7849.
- 11 SOVIET CONTROL COMMISSION FOR GERMANY. Establishment announced by General V. I. Chuikov. Text of statement on transfer of certain functions to German Democratic Republic: *N.Y.T.*, Nov. 12, 1949, p. 5.
- 12 ALBANIA—YUGOSLAVIA. Treaty of friendship and collaboration denounced by Yugoslavia. *C.I.E.D.*, Nov. 3/16, 1949, p. 769; *N.Y.T.*, Nov. 13, p. 41.
- 12-15 DANUBE COMMISSION. Control Commission for Danube Shipping, set up at Belgrade Conference in 1948, opened 1st session Nov. 12 at Galatz, Rumania. *L.T.*, Nov. 14, 1949, p. 3. U. S., U. K. and France sent notes Nov. 15 to Russia, Bulgaria, Hungary, Rumania, Czechoslovakia and Yugoslavia declaring non-recognition of validity of convention of August, 1948, and of jurisdiction of Commission. *N.Y.T.*, Nov. 16, p. 6; *L.T.*, Nov. 16, p. 4. Text of U. S. note: *D.S.B.*, Nov. 28, p. 832.

November, 1949

- 15-January 9, 1950 CHINA (Blockade). Chinese Nationalist warship fired on S.S. *Flying Cloud* off Shanghai. *N.Y.T.*, Nov. 16, 1949, p. 1. U. S. note of Dec. 2 to Nationalist Government demanded cessation of attacks on U. S. ships involved in breaking blockade of Chinese ports. *N.Y.T.*, Dec. 4, p. 1. Text: p. 9; *D.S.B.*, Dec. 19, p. 945. Chinese note of 12th warned foreign ships to keep out of Communist-held ports. Text: *D.S.B.*, Jan. 2, 1950, pp. 23-24. U. S. notified Dec. 17 all U. S. operators and shipmasters that Shanghai waters are a danger zone. *N.Y.T.*, Dec. 18, pp. 1, 26. Text: *D.S.B.*, Dec. 26, p. 957. Chinese note to U. K. announced intention to lay mines in approaches to Communist-held ports. *L.T.*, Dec. 21, p. 3. U. S. re-issued warning Dec. 29. *D.S.B.*, Jan. 9, p. 56. Nationalist warships fired on S.S. *Flying Arrow* in international waters off mouth of Yangtze River. *N.Y.T.*, Jan. 9, p. 1.
- 16 IRAN—JORDAN. Signed treaty of friendship. *N.Y.T.*, Nov. 17, 1949, p. 15.
- 17 FAR EASTERN COMMISSION. Pakistan and Burma became members. *D.S.B.*, Nov. 28, 1949, p. 822.
- 18-January 6, 1950 NORTH ATLANTIC COUNCIL. Held 2d session in Washington. Created financial and economic committee. *N.Y.T.*, Nov. 19, 1949, pp. 1, 3. Text of communiqué: *D.S.B.*, Nov. 28, pp. 819-821. Held 3d meeting in Washington and approved master plan of defense. *N.Y.T.*, Jan. 7, 1950, p. 1. Text of communiqué: *D.S.B.*, Jan. 16, p. 104.
- 20-January 14, 1950 CHINESE (Communist) RECOGNITION. Announced by Albania, Nov. 20; Burma, Dec. 17; India, Dec. 30; Pakistan, Jan. 4; U. K. and Norway, Jan. 6; U. S. S. R. and Yugoslavia [no date]; Ceylon [no date]; Denmark, Jan. 9; Finland, Jan. 13; Sweden, Jan. 14. *N.Y.T.*, Nov. 21, 1949, p. 4; Dec. 1, p. 11; Dec. 18, p. 22; Dec. 30, p. 6; Jan. 5, 1950, p. 19; Jan. 7, p. 1; Jan. 10, p. 32; Jan. 14, p. 5; Jan. 15, p. 21; *L.T.*, Jan. 7, p. 6.
- 22 UNITED STATES—YUGOSLAVIA. U. S. Department of State announced April 17, 1950, as final date for registration of claims for war damages suffered in Yugoslavia. *D.S.B.*, Dec. 5, 1949, p. 865a.
- 23 ALLIED HIGH COMMISSION FOR GERMANY—GERMANY (Federal Republic). Signed protocol of agreement on revision of reparations in Germany, German coöperation in International Ruhr Authority and German pledge of ban on arming. *N.Y.T.*, Nov. 24, 1949, p. 5; Nov. 25, p. 1. Text: p. 4; *D.S.B.*, Dec. 5, pp. 863a-864a; *Germany* No. 4 (1949), *Cmd.* 7849.
- 23 UNITED STATES—URUGUAY. Signed at Washington a treaty of friendship and commerce. Text: *D.S.P.B.*, Nov. 23, 1949, No. 916; 81st Cong., 2d sess., *Sen. Exco. D.* Summary: *D.S.B.*, Dec. 5, pp. 866a-867a.
- 25-December 5 ECONOMIC CONFERENCE. Islamic Economic Conference met at Karachi. Decided to create a permanent organization with headquarters in Karachi and to hold annual conferences. *C.I.E.D.*, Nov. 17/30, 1949, p. 794; Dec. 1/18, p. 831.
- 26 INDIA. Constituent Assembly adopted new constitution containing 395 articles. *N.Y.T.*, Nov. 27, 1949, p. 4; *India News Bulletin* (Washington), Dec. 7, p. 1.
- 30 EMBARGO ON ARMS. U. S. Secretary of State announced U. S. would abide by recommendation of U.N. General Assembly for embargo on arms to Albania and Bulgaria. Text: *D.S.B.*, Dec. 12, 1949, p. 911.

December, 1949

1. NORTH ATLANTIC DEFENSE COMMITTEE. Held 2d meeting in Paris. Text of communiqué: *N.Y.T.*, Dec. 2, 1949, p. 21; *D.S.B.*, Dec. 19, p. 948.
- 2-January 20, 1950 PANAMANIAN RECOGNITION. Granted as follows: Cuba, Dec. 2; U. S., France, Italy, Colombia, Dec. 14; Chile, Jan. 20. *N.Y.T.*, Dec. 3, 1949, p. 5; Dec. 15, pp. 1, 36; Jan. 21, 1950, p. 6; *D.S.B.*, Dec. 26, p. 990.
- 3 REPARATIONS (German). Announcement of re-allocation to 19 members of Inter-Allied Reparation Agency of industrial equipment originally destined for Russia. *N.Y.T.*, Dec. 4, 1949, pp. 1, 10.
- 13 JERUSALEM. Israeli Government proclaimed city its capital in defiance of U.N. decision to internationalize it. *N.Y.T.*, Dec. 14, 1949, p. 1.
- 14-January 5, 1950 INDONESIA. Delegates of 16 states and territories signed at Batavia provisional constitution. *N.Y.T.*, Dec. 14, 1949, p. 1; Dec. 15, p. 31. Queen Juliana of The Netherlands signed bill Dec. 21 for transfer of sovereignty. *N.Y.T.*, Dec. 22, p. 19. Capital city's name changed from Batavia to Jakarta. *N.Y.T.*, Jan. 6, 1950, p. 5.
- 15/January 26, 1950 EUROPEAN ECONOMIC COÖPERATION. Agreement signed with U. S. by German Federal Republic at Bonn. *N.Y.T.*, Dec. 16, 1949, p. 10; *D.S.B.*, Dec. 26, pp. 982-988. Ratified by German Parliament. *N.Y.T.*, Jan. 27, 1950, p. 4.
- 18 BURMA-CHINA. Diplomatic relations severed by Chinese Nationalist Government. *N.Y.T.*, Dec. 19, 1949, p. 16.
- 19 CANADA-GREAT BRITAIN-UNITED STATES. Announced program for standardization of weapons, tactics and military procedures. *N.Y.T.*, Dec. 20, 1949, pp. 1, 13.
- 19 NORTH ATLANTIC DEFENSE ECONOMIC AND FINANCIAL COMMITTEE. Held 1st meeting in Paris and decided to set up a permanent working group in London. W. Averill Harriman chosen chairman. *N.Y.T.*, Dec. 20, 1949, p. 12.
- 19-27 SYRIA. Army coup overthrew government of General Sami Hennawi. *N.Y.T.*, Dec. 20, 1949, pp. 1, 21. President Hashem Atassi agreed Dec. 27 to withdraw his resignation of Dec. 26 and named new Premier. *N.Y.T.*, Dec. 27, pp. 1, 25; Dec. 28, p. 10.
- 20-January 3, 1950 HUNGARY-UNITED STATES. U. S. note called for immediate release of Robert A. Vogeler, held for a month. *N.Y.T.*, Dec. 21, 1949, p. 1. Text: p. 10; *D.S.B.*, Jan. 2, 1950, pp. 21-22. Rejected by Hungary Dec. 24. *N.Y.T.*, Dec. 25, pp. 1, 11. Summary: *D.S.B.*, Jan. 16, p. 96. U. S. note of Jan. 3 ordered closing of Hungarian consulates in New York and Cleveland by Jan. 15. Text: pp. 95-96.
- 21 PEACE PRIZE. Stalin Peace Prize established, to be awarded annually to citizen of any nation for strengthening the peace. *N.Y.T.*, Dec. 21, 1949, pp. 1, 7. Text of decree: *USSR Information Bulletin*, Jan. 13, 1950, p. 2.
- 21-January 13, 1950 PRISONERS OF WAR. Statement made by U. S. member at meeting of Allied Council for Japan on repatriation of Japanese prisoners held by Russia: *D.S.B.*, Jan. 2, 1950, pp. 24-28. U. S. note of Jan. 8 charged that many are held or dead. Text: *D.S.B.*, Jan. 16, pp. 102-103. On Jan. 13 Australia protested detention. *L.T.*, Jan. 14, p. 5.

December, 1949

- 24 UNITED STATES—YUGOSLAVIA. Signed provisional civil air transport agreement at Belgrade. *N.Y.T.*, Dec. 25, 1949, p. 1. Text: *D.S.B.*, Jan. 9, 1950, pp. 63-64.
- 25/*January 1, 1950* WAR CRIMES. Trial of 12 high-ranking Japanese officers opened in Khavarovsk. *C.I.E.D.*, Dec. 19, 1949/Jan. 4, 1950, p. 27. Text of indictment: *New Times* (Moscow), Jan. 1, Supp.
- 26 GREAT BRITAIN—YUGOSLAVIA. Signed at Belgrade 5-year trade and compensation agreements, the latter for former British property in Yugoslavia. *N.Y.T.*, Dec. 27, 1949, pp. 1, 14; *L.T.*, Dec. 28, p. 6. Summary of provisions of trade agreement, in force Jan. 1: *L.T.*, Jan. 7, 1950, p. 6. Texts: *G.B.T.S.* Nos. 5-6 (1950), *Cmd.* 7875, 7880.
- 26-*January 26, 1950.* INDONESIAN RECOGNITION. Granted as follows: Pakistan, Dec. 26; Philippines, Canada, Australia, South Africa, India, Cuba, U. K., Burma, Dec. 27; U. S., Portugal, Belgium, Switzerland, Turkey, Egypt, Norway, China, Dec. 28; Siam, Netherlands and Saudi Arabia [no date]; France, Dec. 30, Vatican, Jan. 6; Russia, Jan. 26; Ireland and Thailand [no date]. *N.Y.T.*, Dec. 27, 1949, p. 18; Dec. 28, p. 6; Dec. 29, p. 12; Jan. 7, 1950, p. 4; Jan. 26, p. 2; *L.T.*, Dec. 28, p. 6; Dec. 31, p. 4; *C.I.E.D.*, Dec. 19, 1949/Jan. 4, 1950, p. 15.
- 27 CZECHOSLOVAKIA—SWITZERLAND. Announced signature in Berne of trade and claims agreements. *N.Y.T.*, Dec. 28, 1949, p. 9.
- 29 HUNGARY—SWEDEN. Sweden protested nationalization of Swedish firms in Hungary and announced suspension of their trade and payments agreement. *C.I.E.D.*, Dec. 19, 1949/Jan. 4, 1950, p. 20.
- 30 FRANCE—INDO-CHINA. Signed agreement establishing monarchy of Viet Nam, consisting of Cochinchina and protectorates of Annam and Tongking, within the French Union. *N.Y.T.*, Dec. 31, 1949, pp. 1-2; *L.T.*, Dec. 31, p. 4.
- 30 GREAT BRITAIN—SWEDEN. Signed monetary agreement at London. Text: *G.B.T.S.* No. 2 (1950), *Cmd.* 7861.
- 30 NORWAY—RUSSIA. Signed agreement outlining procedures for handling potential frontier incidents. *C.I.E.D.*, Dec. 19, 1949/Jan. 4, 1950, pp. 18-19.

January, 1950

- 4 AFGHANISTAN—INDIA. Signed at Delhi 5-year treaty of friendship. *L.T.*, Jan. 5, 1950, p. 3.
- 6 ORGANIZATION OF AMERICAN STATES. Met to act on appeals of Haiti and Dominican Republic. Set up fact-finding committee to investigate alleged conspiracies in Caribbean area. *N.Y.T.*, Jan. 7, 1950, p. 5.
- 9-14 BRITISH COMMONWEALTH CONFERENCE. Met at Colombo, Ceylon, to consider common problems and ways to combat Communism in Asia. *L.T.*, Jan. 10, 1950, p. 4; Jan. 11, p. 6. Text of official statement: *L.T.*, Jan. 16, p. 8. Summary of Mr. Bevin's press conference review: *L.T.*, Jan. 17, p. 6.
- 14 CHINA (Communist)—UNITED STATES. U. S. ordered recall of all officials from Communist China. *N.Y.T.*, Jan. 15, 1950, p. 1. Text of statement: p. 4. Text, with related documents: *D.S.B.*, Jan. 23, pp. 119-123.

January, 1950

- 18 CHINA—UNITED STATES. U. S. took steps to prevent sailing of any Chinese vessels on which the U. S. holds defaulted mortgages. *N.Y.T.*, Jan. 19, 1950, p. 3. Text of U. S. statement and note to China: *D.S.B.*, Jan. 30, pp. 173-174.
- 21 IRELAND—UNITED STATES. Signed treaty of friendship, commerce and navigation. *N.Y.T.*, Jan. 22, 1950, p. 18. Text: *D.S.P.R.*, Jan. 21, No. 59; 81st Cong., 1st sess., *Sen. Exec. H.*
- 26 INDIA. Rajendra Prasad was sworn in as President at the inauguration of the Republic of India. *N.Y.T.*, Jan. 27, 1950, p. 7.
- 26 KOREA—UNITED STATES. Signed at Seoul a mutual defense assistance pact and agreement providing for Korean Military Advisory Group of U. S. Army. *N.Y.T.*, Jan. 27, 1950, p. 7; *D.S.B.*, Feb. 6, p. 212.
- 26 PANAMA—UNITED STATES. Signed claims convention at Panama. *N.Y.T.*, Jan. 27, 1950, p. 10; *D.S.P.R.*, Jan. 26, No. 75.
- 27 NORTH ATLANTIC MUTUAL DEFENSE ASSISTANCE. President Truman proclaimed in effect the North Atlantic joint defense plan. U. S. signed bilateral agreements with Belgium, Denmark, France, Italy, Luxembourg, Netherlands, Norway and U. K. Text of President Truman's statement on signature, Executive Order and U. S.-U. K. agreement: *N.Y.T.*, Jan. 28, 1950, p. 2. Texts of agreements: *D.S.B.*, Feb. 6, pp. 200-211; Feb. 13, pp. 247-256; Feb. 20, pp. 293-295.
- 30 DENMARK—GREAT BRITAIN—NORWAY—SWEDEN. Signed agreement in Paris providing for a limited financial union, known as UNISCAN. *N.Y.T.*, Jan. 31, 1950, p. 5; *L.T.*, Jan. 31, p. 4. Text: *G.B.M.S.* No. 2 (1950), *Cmd.* 7884.
- 30-February 1 EUROPEAN ECONOMIC COÖPERATION ORGANIZATION. Council met in Paris. Named Dirk U. Stikker (Netherlands) political conciliator: *N.Y.T.*, Feb. 1, 1950, pp. 1, 14. Article: *L.T.*, Feb. 2, p. 4.
- 31/February 1 INDO-CHINESE (Communist) RECOGNITION. Granted by Russia. France protested. Text: *N.Y.T.*, Feb. 1, 1950, p. 1. French note returned as impossible to receive. *N.Y.T.*, Feb. 2, p. 6.

UNITED NATIONS AND SPECIALIZED AGENCIES

October, 1949

- 31-December 14 RHINE BOATMEN. Special Conference concerning Rhine Boatmen was held at Geneva, under auspices of I.L.O. German Federal Republic was represented. *N.Y.T.*, Nov. 1, 1949, p. 20. Adjourned Nov. 5 to Dec. 5. On Dec. 14 delegates from Netherlands, Germany, France, Switzerland, U. K. and Belgium approved agreements on social security for Rhine River boatmen and multilateral agreement on uniform work conditions, vacations, etc., for workers on all cargo vessels normally using the waterway. *N.Y.T.*, Dec. 15, p. 15; *U.N.P.R.* ILO/306 and 318.

November, 1949

- 1-December 10 GENERAL ASSEMBLY (4th session). Adopted resolutions on economic development, Italian colonies, re-establishment of Interim Committee, membership applications, Communism in Asia, reparation claims of U.N., colonial affairs, prostitution, refugees, disarmament, South West Africa, U.N. budget and Jerusalem. Texts: *G.A. (IV) O.R.*, Resolutions; *U.N.Doc.* A/1251. Major decisions of session: *N.Y.T.*, Dec. 11, 1949, p. 26-27. Round-up: *U.N.P.R.* GA/600. Articles: *U.N.B.*, Jan. 1, 1950, pp. 2-20, 68-76; *D.S.B.*, Jan. 2, pp. 3-15.

November, 1949

- 3 U.N.E.S.C.O.—KOREA. Korean request for membership was forwarded to U.N. U.N.Doc. E/1558, pp. 2-3.

3-December 17 KASHMIR COMMISSION. Announced completion of demarcation of cease-fire line separating Indian and Pakistani troops in Kashmir. *N.Y.T.*, Nov. 4, 1949, p. 7. Reported failure Dec. 12 and suggested turning task over to one person with broad powers. *N.Y.T.*, Dec. 13, p. 25. Article: *U.N.B.*, Jan. 15, 1950, pp. 86-90. Text of report: U.N. Docs. S/1430 and Add. 1-3.

6/January 9, 1950 ECONOMIC SURVEY MISSION FOR THE MIDDLE EAST. Signed 1st interim report at Beirut. Text: U.N.Doc. A/1106. Summary: *D.S.B.*, Dec. 5, 1949, pp. 847a-852a. Released Jan. 9 final report. Summary: *U.N.B.*, Jan. 15, 1950, p. 85. Text: U.N.Doc. A/AC.25/6 (1949.II.B.5, pts. I-II).

21-December 7 F. A. O. Held 5th annual conference at Washington. Admitted to membership Indonesia, Israel, Korea, Afghanistan and Sweden. *D.S.B.*, Dec. 19, 1949, p. 935. Chose Italy as permanent headquarters. *N.Y.T.*, Nov. 29, p. 12. Elected Pakistan, Burma, Venezuela, Belgium, Yugoslavia and U. K. to the Council. *U.N.P.R.* FAO/419. Selected 14-nation Committee on Commodity Problems which will route surplus goods to neediest countries. Members: *N.Y.T.*, Dec. 8, p. 21.

29 W. H. O.—WITHDRAWAL. Bulgaria announced withdrawal. *N.Y.T.*, Dec. 8, 1949, p. 23; *U.N.P.R.* H/489.

December, 1949

4 PANEL FOR INQUIRY AND CONCILIATION U. S. named as its members: Philip C. Jessup, Ralph J. Bunche, Frank P. Graham, H. Merle Cochran, Mark F. Ethridge. *N.Y.T.*, Dec. 5, 1949, p. 3. Other members: U.N.Doc. A/1198.

5-16 SOCIAL COMMISSION. Held 5th session at Lake Success. Provisional agenda: U.N.Doc. E/CN.5/155. Report of the session: U.N.Doc. E/1568. Disposition of agenda items: U.N.Doc. E/CN.5/186.

8-20 TRUSTEESHIP COUNCIL. Held special session at Lake Success. *U.N.B.*, Jan. 1, 1950, p. 47. Voted to admit Egypt, Colombia, Ethiopia and India as non-voting members. *N.Y.T.*, Dec. 10, 1949, p. 2. Israeli Government proclaimed Jerusalem its capital in defiance of U.N. decision to internationalize it. *N.Y.T.*, Dec. 14, 1949, p. 1. Adopted resolution authorizing President to invite Israel to move governmental offices out of Jerusalem. Text: *N.Y.T.*, Dec. 21, 1949, pp. 1, 22; U.N.Doc. T/427; *U.N.B.*, Jan. 15, 1950, p. 105. Adopted resolution empowering President to prepare working paper on statute for Jerusalem in accordance with Assembly resolution of Dec. 9, 1949, to be submitted to 6th regular session of the Council. Text: p. 105. Session ended Dec. 20. *D.S.B.*, Dec. 26, 1949, p. 975. Israel declined request to move from Jerusalem. Excerpts: *N.Y.T.*, Jan. 1, 1950, pp. 1, 9. Text: U.N.Doc. T/431.

13/January 19, 1950. SOMALILAND COMMITTEE. Composed of Dominican Republic, France, Iraq, Philippines, U. K. and U. S., met at Lake Success and Geneva. Text of draft report to Trusteeship Council: U.N.Doc. T/AC.18/L.9. Text of trusteeship agreement as adopted: U.N.Doc. T/AC.18/L.7.

14 I.B.R.D.—LOANS—Loan of \$12,545,000 granted to El Salvador. Text of agreement: I.B.R.D. Loan Number 22ES.

15 KOREAN COMMISSION. Reconstituted by vote of General Assembly on Oct. 21, held 1st meeting at Seoul. *N.Y.T.*, Dec. 16, 1949, p. 13.

December, 1949

15/January 12, 1950 I.C.J. (Corfu Channel). Damages awarded U. K. in amount of £843,947 (\$2,363,051) by vote of 12-2. *L.T.*, Dec. 16, 1949, p. 4; *N.Y.T.*, Dec. 16, p. 4. Text of judgment: I.C.J. *Reports*, 1949, pp. 244-265. British note asked how Albania proposed to pay damages. *L.T.*, Jan. 18, 1950, p. 3.

29-January 17, 1950 SECURITY COUNCIL. Soviet delegate made formal statement regarding his government's position on status of Chinese delegate, scheduled to become President for January. *U.N.B.*, Jan. 15, 1950, p. 92. At opening meeting Jan. 10 Russian delegate withdrew. *N.Y.T.*, Jan. 11, p. 1. Text of draft resolution on exclusion: *U.N.Doc.* S/1443. By vote of 6-3-2 rejected Soviet demand for expulsion of Chinese delegate. *U.N.P.R.* SC/1096. Adopted resolution asking Conventional Armaments Commission to make new study with priority given to census plan. *N.Y.T.*, Jan. 18, p. 12.

January, 1950

- 2 U.N.—GREECE. Greek Government stated willingness to re-establish normal diplomatic relations with Albania and Bulgaria. Text of note: *U.N.P.R.* BAL/625.
- 5 U.N.E.S.C.O.—INDONESIA. United States of Indonesia applied for membership. *U.N.Doc.* E/1592.
- 10 ERITREAN COMMISSION. Set up by General Assembly and composed of representatives of Burma, Guatemala, Norway, Pakistan and South Africa, to study future disposition of Eritrea, met at Lake Success. Elected U Aung Khine (Burma) temporary chairman. *U.N.P.R.* ERIT/3. To proceed to Cairo and Asmara for future talks. *N.Y.T.*, Jan. 11, 1950, p. 4.
- 10 W.H.O.—CZECHOSLOVAKIA. W.H.O. ordered to withdraw. *N.Y.T.*, Jan. 11, 1950, p. 8.
- 15 I.R.O.—CZECHOSLOVAKIA. I.R.O. mission in Prague ordered closed. *L.T.*, Jan. 11, 1950, p. 5; *U.N.P.R.* IRO/205.
- 18-30 ECONOMIC AND EMPLOYMENT COMMISSION. Held 5th session at Lake Success. *N.Y.T.*, Jan. 19, 1950, p. 3. Agenda: *U.N.Doc.* E/CN.1/75/Rev. 1. Elected Roland Wilson (Australia) chairman. Russian, Polish, Czechoslovak and Ukrainian members withdrew due to seating of Chinese member. *U.N.P.R.* EC/790. Report of session: *U.N.Doc.* E/1600 (E/CN.1/79). Round-up: *U.N.P.R.* EC/802.
- 19/February 12 ATOMIC ENERGY COMMISSION. Met at Lake Success. Session adjourned following withdrawal of Soviet representative because of presence of Chinese delegate. *N.Y.T.*, Jan. 20, 1950, p. 1; *U.N.P.R.* AC/224. Report of meeting: *U.N.Doc.* A/1253. Text of Russian letter of Feb. 12: *N.Y.T.*, Feb. 13, p. 2.
- 19-31 TRUSTEESHIP COUNCIL. Opened 6th session Jan. 19 at Geneva. Agenda: *U.N.Doc.* T/425/Rev. 1. Annotated agenda: *U.N.P.R.* TR/345. Ethiopia in message of Jan. 4 refused to recognize Assembly decision to give Italy trusteeship over Somaliland. *L.T.*, Jan. 5, 1950, p. 3. Text: *U.N.Doc.* T/430. Approved Jan. 27 agreement under which Italy will administer Somaliland. *N.Y.T.*, Jan. 28, p. 5. Text: *U.N.Doc.* T/456. Ethiopian note of Jan. 29 protested appointment of General Guglielmo Nasi as Governor of Somaliland, claiming he was listed as war criminal by Allied War Crimes Commission. Extracts: *N.Y.T.*, Jan. 30, p. 7. Ethiopia gave notice Jan. 30 it considered agreement

January, 1950

invalid. *N.Y.T.*, Jan. 31, p. 12; *L.T.*, Jan. 31, p. 3. Text: *U.N.Doc.* T/455. M. Garreau (France) made proposal for internationalization of Holy Places. Summary: *N.Y.T.*, Jan. 31, p. 14. Considered unacceptable by Israel. *L.T.*, Feb. 1, p. 3. Text of working paper on international régime for Jerusalem: *U.N.Doc.* T/457.

20/February 3 *U.N.*—CHINA (Communist). Chinese Communist government sent two cablegrams to Secretary General asking when its delegation may participate in *U.N.* work and when "illegitimate" Nationalist mission will be expelled. *L.T.*, Jan. 21, 1950, p. 6. Texts: *U.N.Doc.* S/1462, pp. 2-3.

MULTIPARTITE CONVENTIONS

AUDIO-VISUAL AIDS. Lake Success, July 15, 1949.

Signatures: Afghanistan, Denmark, Ecuador, El Salvador, Dec. 29, 1949, *N.Y.T.*, Dec. 30, 1949, p. 9; *U.N.P.R.* UNESCO/161; Brazil and Dominican Republic, Sept. 15, 1949, *U.N.Pub.* 1949. V. 9, p. 134; Canada, *U.N.P.R.* UNESCO/160; Haiti, Dec. 2, 1949, *U.N.P.R.* UNESCO/157; Lebanon, Dec. 30, 1949, *U.N.P.R.* UNESCO/162; Netherlands,* Dec. 30, 1949, *U.N.P.R.* UNESCO/163; Norway, Dec. 20, 1949, *U.N.P.R.* UNESCO/160; U. S., Sept. 13, 1949, *N.Y.T.*, Sept. 14, p. 6; *U.N.Pub.* 1949. V. 9, p. 139.

AVIATION CONVENTION. Chicago, Dec. 7, 1944. Ratification deposited: Lebanon, Sept. 19, 1949. *T.I.A.E.*, Nov., 1949, p. 22.

CUSTOMS CONVENTIONS ON TOURING, COMMERCIAL ROAD VEHICLES, AND INTERNATIONAL TRANSPORT OF GOODS BY ROAD. Provisional Application. Geneva, June 16, 1949. Signatures: Belgo-Luxembourg Economic Union,* France, Italy, Netherlands,* Norway, Switzerland, U. K., *U.N.Pub.* 1949. V. 9, p. 118; Austria, Dec. 27, 1949, *U.N.P.R.* L/113; Czechoslovakia, Dec. 28, 1949, *U.N.P.R.* L/115; Denmark, Dec. 29, 1949, *U.N.P.R.* L/117.

Text: *U.N.Docs.* E/ECE/109; E/ECE/TRANS/162, pp. 2-8.

In force Jan. 1, 1950. *U.N.P.R.* L/113.

ECONOMIC STATISTICS. Protocol of Amendment. Paris, Dec. 9, 1948. Acceptance deposited: Austria. Nov. 10, 1949. *T.I.A.E.*, Nov., 1949, p. 16.

F.A.O. Constitution. Quebec, Oct. 16, 1945. Acceptance: Israel. Jan. 10, 1950. *U.N.P.R.* FAO/425.

GENOCIDE. Paris, Dec. 11, 1948.

Signatures: Belgium, Dec. 12, 1949, *U.N.P.R.* L/109; Burma, Dec. 30, 1949, *U.N.P.R.* L/118; Byelorussia,* Ukraine,* U.S.S.R.,* Dec. 16, 1949, *U.N.P.R.* L/110; Canada, Nov. 28, 1949, *N.Y.T.*, Nov. 29, 1949, p. 13; Cuba and Czechoslovakia,* Dec. 28, 1949, *U.N.P.R.* L/114 and 115; Ecuador, Dec. 21, 1949, *N.Y.T.*, Dec. 22, p. 17; *U.N.P.R.* L/111; Greece, Dec. 29, 1949, *N.Y.T.*, Dec. 30, p. 9; *U.N.P.R.* L/116; India, Nov. 29, 1949, *U.N.P.R.* L/106; Iran, Dec. 9, 1949, *U.N.P.R.* L/107; Lebanon, Dec. 30, 1949, *U.N.P.R.* L/119; New Zealand, Nov. 25, 1949, *U.N.P.R.* L/104; Sweden, Dec. 30, 1949, *U.N.P.R.* L/118.

Ratifications: Australia, Ethiopia, Iceland, Norway, *U.N.P.R.* L/106; Ecuador, Dec. 21, 1949, *U.N.P.R.* L/111; Guatemala, Jan. 13, 1950, *N.Y.T.*, Jan. 14, 1950, p. 2; Panama, Jan. 11, 1950, *U.N.P.R.* L/120.

* With reservation.

HAGUE CONVENTION No. X (Geneva Convention in Maritime War), Oct. 18, 1907. Revision. Geneva, August 12, 1949. Signatures: Afghanistan, Argentina, Austria, Belgium, Bolivia, Brazil, Canada,* Egypt, Spain, U. S.,* Ethiopia, Finland, France, Hungary, Iran, Israel,* Italy, Lebanon, Luxembourg, Mexico, Netherlands,* Philippines, Poland, U. K.,* Vatican, El Salvador, Sweden, Czechoslovakia, Dec. 8, 1949, *Evening Star* (Washington), Dec. 9, 1949, p. B 10; Byelorussia, Ukraine, U.S.S.R., Dec. 12, 1949, *N.Y.T.*, Dec. 13, p. 11.

I.L.O. Constitution, Instrument for Amendment of. Montreal, Oct. 9, 1946. Ratification deposited: Chile. Nov. 3, 1949. *T.I.A.R.*, Nov., 1949, p. 20.

METEOROLOGICAL ORGANIZATION. Washington, Oct. 11, 1947. Ratification: France. Dec. 5, 1949. *U.N.P.R.* SA/59.

MOST-FAVORED-NATION TREATMENT (Germany). Memorandum. Annecy, August 13, 1949.

Signatures: Belgium, Brazil, Canada, Aug. 13, 1949; Denmark, Nov. 8, 1949; Dominican Republic, Oct. 5, 1949; France, India, Aug. 13, 1949; Netherlands, Oct. 10, 1949; Norway, Aug. 13, 1949; Syria, Sept. 24, 1949; U. K. and U. S., Aug. 13, 1949.

Text: *G.B.T.S.* No. 7 (1950), *Cmd.* 7876.

NARCOTICS (Synthetic). Protocol. Paris, Nov. 19, 1948.

Application to: Laos (by France). *T.I.A.R.*, Dec., 1949, p. 14.

Signature: Yemen, Dec. 12, 1949.

In force Dec. 1, 1949. *U.N.P.R.* L/108.

OBSCENE PUBLICATIONS. Paris, May 4, 1910. Protocol of Amendment. Lake Success, May 4, 1949. Signatures: Australia, Dec. 8, 1949; India, Dec. 28, 1949, *T.I.A.R.*, Dec., 1949, p. 12; Denmark,* Nov. 21, 1949, *T.I.A.R.*, Nov., 1949, p. 18.

PRISONERS OF WAR. Geneva, August 12, 1949. Signatures: Afghanistan, Argentina, Austria, Belgium, Bolivia, Brazil, Canada,* Ceylon, Egypt, Spain, U. S.,* Ethiopia, Finland, France, Hungary, Iran, Israel,* Italy, Lebanon, Luxembourg, Mexico, Netherlands,* Philippines, Poland, U. K.,* Vatican, El Salvador, Sweden, Czechoslovakia, Dec. 8, 1949, *Evening Star* (Washington), Dec. 9, 1949, p. B 10; Byelorussia, Ukraine, U.S.S.R., Dec. 12, 1949, *N.Y.T.*, Dec. 13, p. 11.

PRIVILEGES AND IMMUNITIES, COUNCIL OF EUROPE. Paris, Sept. 2, 1949.

Signatures: Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, Turkey, U. K.

Text: *G.B.M.S.* No. 17 (1949), *Cmd.* 7780.

PRIVILEGES AND IMMUNITIES, UNITED NATIONS. London, Feb. 13, 1946. Accessions deposited: Bolivia, Dec. 23, 1949; Brazil, Dec. 15, 1949, *T.I.A.R.*, Dec., 1949, p. 14.

PROTECTION OF CIVILIANS IN TIME OF WAR. Geneva, August 12, 1949. Signatures: Afghanistan, Argentina, Austria, Belgium, Bolivia, Brazil, Canada,* Egypt, Spain, U. S.,* Ethiopia, Finland, France, Hungary, Iran, Israel,* Italy, Lebanon, Luxembourg, Mexico, Netherlands,* Philippines, Poland, U. K.,* Vatican, El Salvador, Sweden, Czechoslovakia, Dec. 8, 1949, *Evening Star* (Washington), Dec. 9, 1949, p. B 10; Byelorussia, Ukraine, U.S.S.R., Dec. 12, 1949, *N.Y.T.*, Dec. 13, p. 11.

RED CROSS. Geneva, August 12, 1949. Signatures: Afghanistan, Argentina, Austria, Belgium, Bolivia, Brazil, Canada,* Ceylon, Egypt, Spain, U. S.,* Ethiopia, Finland, France, Hungary, Iran, Israel,* Italy, Lebanon, Luxembourg, Mexico, Netherlands,*

* With reservation.

Philippines, Poland, U. K.,* Vatican, El Salvador, Sweden, Czechoslovakia, Dec. 8, 1949, *Evening Star* (Washington), Dec. 9, 1949, p. B 10; Byelorussia, Ukraine, U.S.S.R., Dec. 12, 1949, *N.Y.T.*, Dec. 13, p. 11.

RICE COMMISSION. Constitution. Baguio, March 13, 1948.

Acceptances deposited: Burma, Nov. 29, 1948; Ceylon, Sept. 27, 1948; Cuba, Jan. 10, 1949; Ecuador, Sept. 7, 1948; Egypt, Nov. 29, 1948; France, Aug. 10, 1948; India, Oct. 12, 1948; Italy, Oct. 6, 1948; Mexico, Dec. 17, 1948; Netherlands, Nov. 12, 1948; Pakistan, Oct. 5, 1948; Philippines, Jan. 4, 1949; Siam, Nov. 1, 1948; U. K., Feb. 28, 1949; U. S., Feb. 28, 1949.

Text: *T.I.A.S.* 1938.

In force Jan. 4, 1949.

ROAD SIGNS AND SIGNALS. Protocol. Geneva, Sept. 19, 1949. Signatures: Austria,* Belgium, Denmark, Egypt, France, Israel, Italy, Lebanon,* Luxembourg, Netherlands, Norway,* Sweden,* Switzerland, Yugoslavia, *U.N.P.R.* 1949. V. 9, pp. 136-137; Czechoslovakia, Dec. 28, 1949, *U.N.P.R.* L/115 and 117; India, Dec. 29, 1949, *N.Y.T.*, Dec. 30, 1949, p. 9.

ROAD TRAFFIC. Geneva, Sept. 19, 1949. Signature: Czechoslovakia, Dec. 28, 1949. *U.N.P.R.* L/115.

Protocol of Accession of Occupied Countries. Geneva, Sept. 19, 1949. Signatures: Belgium, Denmark, Dominican Republic, Egypt, France, India, Italy, Lebanon,* Luxembourg, Netherlands, Norway, Philippines, Sweden, Switzerland, South Africa, U. K. and U. S., *U.N.P.R.* 1949. V. 9, p. 135.

SOCIAL AND MEDICAL ASSISTANCE. Paris, Nov. 7, 1949. Signatures: France, Belgium, Netherlands, U. K., Luxembourg, *L.T.*, Nov. 8, 1949, p. 3.

SOCIAL SECURITY. Paris, Nov. 7, 1949. Signatures: Belgium, France, Luxembourg, Netherlands, U. K., *L.T.*, Nov. 8, 1949, p. 3.

TRADE AND TARIFFS. Protocol of Modification (1st). Annecy, August 13, 1949. Signatures: Czechoslovakia, Dec. 8, 1949, *U.N.P.R.*, ITO/191; Pakistan, Dec. 21, 1949, *U.N.P.R.* ITO/192.

Protocol of Rectifications (3d). Annecy, August 13, 1949. Signatures: Czechoslovakia, Dec. 8, 1949, *U.N.P.R.* ITO/191; Pakistan, Dec. 21, 1949, *U.N.P.R.* ITO/192.

Protocol of Terms of Accession. Lake Success, Oct. 10, 1949. Signatures: Belgium and Norway, Nov. 25, 1949, *N.Y.T.*, Nov. 26, 1949, p. 4; Brazil, Chile, China, Czechoslovakia, Nov. 30, 1949, *N.Y.T.*, Dec. 1, p. 20; Burma, Nov. 1, 1949, *U.N.P.R.* ITO/184; Ceylon, India, South Africa, Nov. 29, 1949, *N.Y.T.*, Nov. 30, p. 15; Liberia, Nov. 28, 1949, *N.Y.T.*, Nov. 29, p. 5; Luxembourg, Nov. 18, 1949, *U.N.P.R.* ITO/186; New Zealand, Nov. 30, 1949, *U.N.P.R.* ITO/190; Syria, Nov. 16, 1949, *N.Y.T.*, Nov. 17, p. 9.

W.H.O. Constitution. New York, July 22, 1946.

Signatures: Ceylon, Nov. 14, 1949, *T.I.A.E.*, Dec., 1949, p. 16; Peru, Nov. 15, 1949, *N.Y.T.*, Nov. 16, p. 12; *T.I.A.E.*, Nov., p. 16.

Ratifications deposited: Bolivia, Dec. 23, 1949, *U.N.P.R.* SA/59 and L/112; Peru, Nov. 15, 1949, *U.N.P.R.* H/481.

WHITE SLAVE TRADE. Paris, May 18, 1904, and May 4, 1910. Protocol of Amendment. Lake Success, May 4, 1949. Signatures: Australia, Dec. 8, 1949; India and Iran,* Dec. 28, 1949, *T.I.A.E.*, Dec., 1949, p. 12.

DOROTHY B. DART

* With reservation.

JUDICIAL DECISIONS

BY WILLIAM W. BISHOP, JR.

Of the Board of Editors

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Territory—leased bases held “foreign country”

UNITED STATES *v.* SPELAR. 338 U. S. 217.

United States Supreme Court, Nov. 7, 1949. Reed, J.

Reversing the decision of the Court of Appeal, 171 F. (2d) 208, this JOURNAL, Vol. 43 (1949), p. 374, the Supreme Court held that the United States air base in Newfoundland acquired under the Executive Agreement and Lease of March 27, 1941, from Great Britain, was a “foreign country” within the provisions of the Federal Tort Claims Act excluding recovery thereunder for claims “arising in a foreign country.” The Court of Appeal had relied on the decision in *Vermilya-Brown Co., Inc. v. Connell*, 335 U. S. 377, this JOURNAL, Vol. 43 (1949), p. 172, holding such bases “possessions” of the United States to which the Fair Labor Standards Act applied. Justice Reed said:

We know of no more accurate phrase in common English usage than “foreign country” to denote territory subject to the sovereignty of another nation. By the exclusion of “claims arising in a foreign country,” the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States. We repeat what was said in *Vermilya-Brown* . . . “The arrangements under which the leased bases were acquired from Great Britain did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States.” Harmon Field, where this claim “arose,” remained subject to the sovereignty of Great Britain and lay within a “foreign country.” The claim must be barred.

Discussing the legislative history of the statute, the Court held that it sustained the conclusion that:

though Congress was ready to lay aside a great portion of the sovereign’s ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power. The legislative will must be respected. The present suit, premised entirely upon Newfoundland’s law, may not be asserted against the United States in contravention of that will.

Though the majority opinion distinguished the *Vermilya-Brown* case

because "the statutory language and the legislative record" differed in the two Acts, Frankfurter and Jackson, JJ., concurred in the present result, but thought the Vermilya-Brown decision incorrect.

Expatriation—foreign naturalization and oath of allegiance—residence abroad

SAVORGNAN v. UNITED STATES. 338 U. S. 491.

United States Supreme Court, Jan. 9, 1950. Burton, J.

Affirming the decision of the Court of Appeals, 171 F. (2nd) 155, this JOURNAL, Vol. 43 (1949), p. 375, the Court held (Frankfurter and Black, JJ., dissenting) that American citizenship was lost by a native-born woman who in the United States applied for Italian citizenship in order to marry an Italian foreign service officer, signed in Chicago a document in Italian swearing allegiance to Italy, and went with her husband to Italy in 1941 when Italian representatives were ordered to leave this country. After her return to the United States in 1945, the District Court held that she was not expatriated since she did not intend to give up American citizenship or to establish a permanent residence abroad.

The Court held that whether or not she lost American citizenship by the oath and the obtaining of Italian citizenship while still in this country, her expatriation certainly resulted when, after performing such acts, she took up residence abroad. The Court said, in part:

Traditionally the United States has supported the right of expatriation as a natural and inherent right of all people.

.

the acts upon which the statutes [8 U. S. Code, §§ 801(a) and 803(a)] expressly condition the consent of our Government to the expatriation of its citizens are stated objectively. There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.

The United States has long recognized the general undesirability of dual allegiances. . . . Temporary or limited duality of citizenship has arisen inevitably from differences in the laws of the respective nations as to when naturalization and expatriation shall become effective. There is nothing, however, in the Act of 1907 [34 Stat. 1228] that implies a congressional intent that, after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he, nevertheless, can preserve for himself a duality of citizenship by showing his intent or understanding to have been contrary to the usual legal consequences of such an act.

As to the oath and application for Italian citizenship which were in Italian, a language she did not read at the time she signed them, the Court said that her fiancé was with her and could translate and explain them to

her, that she knew of their importance, and was "as responsible for understanding them as if they had been in English." In reply to her contention that she did not lose her citizenship because "residence" abroad was a prerequisite to expatriation and she had not intended to make her domicile or permanent residence outside the United States, the Court answered that:

The test of such "residence" is whether . . . she did, in fact, have a "principal dwelling place" or "place of general abode" abroad. . . . Whatever may have been her reasons, wishes or intent, her principal dwelling place was in fact with her husband in Rome where he was serving in his Foreign Ministry. Her intent as to her "domicile" or as to her "permanent residence," as distinguished from her actual "residence," "principal dwelling place," and "place of abode," is not material. She expatriated herself under the laws of the United States by her naturalization as an Italian citizen followed by her residence abroad.

Aliens—exclusion without hearing—"war bride" of American soldier
 UNITED STATES EX REL. KNAUFF v. SHAUGHNESSY. 338 U. S. 537.
 United States Supreme Court, Jan. 16, 1950. Minton, J.

The Court rejected (Frankfurter, J., dissenting, and Clark and Douglas, JJ., taking no part) an application for *habeas corpus* to prevent the exclusion, without any hearing of the charges against her, of a "war bride" of an honorably discharged American citizen soldier. She was a German woman who had lived in England throughout the war as a refugee, serving with the Royal Air Force until May 30, 1946, when she became a civilian employee of the United States War Department in Germany, in which capacity she received an "excellent" rating. Some months after marrying an American citizen then employed by the Army in Frankfurt, when she sought admission to the United States under the War Brides Act of 1945, 8 U. S. Code §§ 232 *et. seq.*, she was excluded without hearing on the ground that her admission would be prejudicial to the interests of the United States, the Attorney General's order of exclusion being based on the Act of June 21, 1941, providing that, during national emergency or while the United States was at war, the President might impose additional restrictions on the entry or departure of aliens.

Upholding this plenary power to exclude without hearing and despite the sweeping terms of the War Brides Act, the Court said in part:

Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. . . .
 . . . The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the na-

tion. . . . When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

. . . . Whatever the rule may be concerning deportation . . . it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien. . . . Normally, Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, *e.g.*, as was done here, for the best interests of the country during a time of national emergency. . . .

Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned. . . .

. . . . The national emergency has never been terminated. Indeed, a state of war still exists. . . . Thus the authority upon which the Attorney General acted remains in force. . . .

The War Brides Act does not relieve petitioner of her alien status. . . . The Act relieved her of certain physical, mental, and documentary requirements and of the quota provisions of the immigration laws. But she must, as the Act requires, still be "otherwise admissible under the immigration laws." . . .

There is nothing in the War Brides Act or its legislative history to indicate that it was the purpose of Congress . . . to relax the security provisions of the immigration laws. . . . As all other aliens, petitioner had to stand the test of security. This she failed to meet.

Aliens—deportation for offenses committed while citizens

U. S. EX REL. EICHENLAUB *v.* SHAUGHNESSY; U. S. EX REL. WILLUMETT *v.* SHAUGHNESSY. 338 U. S. 521.

United States Supreme Court, Jan. 16, 1950. Burton, J.

In these cases the Court held that the Act of May 10, 1920, 41 Stat. 593, 8 U. S. Code § 157, authorized the deportation of persons who had been naturalized as American citizens, were convicted while citizens of conspiracy to violate the Espionage Act (40 Stat. 217), thereafter suffered cancellation of naturalization, and were found after hearings to be undesirable residents. The language of the statute provided for deportation of "aliens" convicted of violation or conspiracy to violate certain statutes, including the Espionage Act, who were found by the Attorney General, after hearing, to be undesirable residents. The Court held that the statutory words "do not limit its scope to aliens who never have been naturalized." It was held unnecessary to determine whether the subsequent cancellation of naturalization rendered the persons "aliens" at the time of their conviction, as the Government claimed.

Frankfurter, Black, and Jackson, JJ., dissented, and Clark and Douglas, JJ., took no part in the decision.

Aliens—deportation—crimes involving moral turpitude prior to "entry"

SOHOEPS v. CARMICHAEL. 177 F. (2nd) 391.

U. S. Ct. App., Ninth Circuit, Sept. 23, 1949. Bone, Ct. J.

Habeas corpus was unsuccessfully sought to prevent deportation of an alien resident since 1911, who was arrested in 1943 in California for sexual perversion and admitted having committed similar acts in New York around 1923. He also admitted having voluntarily left the country in 1939 for a visit to Mexico, returning the same day. His deportation was ordered under 8 U.S.C.A. § 155 (a) providing for deportation of "any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime . . . involving moral turpitude." His brief trip to Mexico was held to constitute an "entry" within the statute, since his departure was voluntary and he knew his destination was foreign, while it made no difference that the crime was committed in the United States so long as it was "prior to entry," the statutory purpose being to rid the country of undesirable aliens.

Treaties—interpretation—international aviation—Warsaw Convention

AMERICAN AIRLINES, INC., v. ULEN, ADMX. 1949 U. S. Av. Rep. 338.

U. S. Ct. App., District of Columbia, Sept. 26, 1949. Clark, J.

The court affirmed a judgment of the District Court, 1948 U. S. Av. Rep. 161, based on a jury verdict, for \$25,000 in favor of a passenger against an airline for injuries sustained when the plane crashed into a mountain in Virginia at an elevation of 3910 feet, and it was shown that the flight plan called for flying at 4000 feet altitude on a course within less than two miles from this mountain whose summit was 4080 feet high. The relevant Civil Aeronautics Board regulation required such planes to fly not "less than 1000 feet above the obstacle located within a horizontal distance of 5 miles from the center of the course intended to be flown." Defendant's contention that the Warsaw Convention, 49 Stat. 3000, applied, and limited recovery to \$8,291.87, was rejected on the ground that under Art. 25(1) the carrier was not entitled to the benefit of the Convention limitations "if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct."

The language of the Convention was French, and the original term translated as "wilful misconduct" was *dol*. The court rejected defendant's contention that *dol* was improperly translated, and really meant "fraud" or "deceit," thus requiring something like malicious or criminal intent. Looking to the records of the Conference which formulated the

Warsaw Convention, the court found disagreement as to the terms which would express the idea in various languages, but that one English delegate had suggested that "wilful misconduct" covered the idea, including "not only the acts accomplished deliberately, but also acts of insouciance, without concern for the consequences." The court approved the charge to the jury, that mere violation of the safety regulations would not necessarily be wilful misconduct, but that intentional violation with knowledge that violation was likely to cause injury to a passenger, or if done with wanton and reckless disregard of the consequences, would be wilful misconduct.

KRAUS v. KONINKLIJKE LUCHTVAART MAATSCHAPPIJ, N.V. 2 C. C. H. Av. Rep. 15017.

N. Y. Sup. Ct., Spec. Term N. Y. County, Oct. 4, 1949. Hecht, J.

Plaintiff sued to recover \$3,650 as the value of a rare book shipped in international transportation over defendant's line, but was awarded only the equivalent of 250 francs, as the package weighed two pounds and the Warsaw Convention provided that the carrier's liability should be limited to 250 francs per kilogram unless consignor made a special declaration of value and paid a supplementary sum. The court held that the waybill conformed to the requirements of the Warsaw Convention that it indicate the "agreed stopping places," since the waybill stated "See lists of scheduled stops in the timetables of the carriers concerned, which lists . . . are made part hereof."

War—enemy property controls—American citizen of dual nationality—residence

MCGRATH v. ZANDER. 177 F. (2d) 649.

U. S. Ct. App., District of Columbia, Oct. 10, 1949. Proctor, Ct. J.

Affirming the decision of the District Court, 80 F. Supp. 453, this JOURNAL, Vol. 43 (1949), p. 184, the court held that a native-born American citizen, who married a German citizen and remained in Germany during World War II, was entitled to a return of property seized by the Alien Property Custodian, even though she acquired German nationality under German law, since at the time of her marriage she had expressed the intention of maintaining domicile in the United States and had in fact returned. The court said she was not "resident" in Germany and for that reason not an "enemy" within Section 9(a) of the Trading with the Enemy Act; that the word "resident" is "rather indicative of a settled and permanent place of abode, volitionally acquired and voluntarily assumed. It is a habitation having domiciliary properties."

Naturalization—"good moral character"

SCHMIDT v. UNITED STATES. 177 F. (2d) 450.

U. S. Ct. App., Second Circuit, Oct. 24, 1949. L. Hand, C. J.

Petitioner for naturalization had resided in the United States since 1939, was a teacher, and was in every way qualified for naturalization except that he had admitted occasional meretricious relationships with unmarried women. Reversing an order which had denied naturalization for lack of good moral character, the court said:

We have answered in the negative the question whether an unmarried man must live completely celibate, or forfeit his claim to a "good moral character"; but, as we have said, those were cases of continuous, though adulterous, union. We have now to say whether it makes a critical difference that the alien's lapses are casual, concupiscent and promiscuous, but not adulterous. We do not believe that discussion will make our conclusion more persuasive; but, so far as we can divine anything so tenebrous and impalpable as the common conscience, these added features do not make a critical difference.¹

Aliens—right to sue despite pending deportation

ROBERTO ET AL. v. HARTFORD FIRE INS. CO. 177 F. (2d) 811.

U. S. Ct. App., Seventh Circuit, Oct. 27, 1949. Duffy, Ct. J.

In 1934 plaintiff took out a fire insurance policy, upon which he now sues for a 1936 fire loss. At the time of the policy he was a naturalized citizen who was awaiting deportation under a conviction of perjury for statements made in his application for citizenship, his naturalization apparently having been canceled. Defendant company refused to pay on the ground that plaintiff was illegally in the country at the time when the policy was taken out, citing *Coules v. Pharris*, 212 Wisc. 558, 250 N. W. 404 (1933), which case denied recovery of wages because plaintiff was an alien illegally in the country. Disapproving of that case but distinguishing it on the facts, the court affirmed a judgment for plaintiff on the ground that until deportation plaintiff was a resident alien legally in the country and entitled to enforce contracts, sue, etc., under 8 U. S. C. A. § 41; and that after deportation he was at least as well off as any other alien, being entitled to bring suit as a non-resident alien.

¹ In *Petition of Gani*, 86 F. Supp. 683 (W. D. La., Aug. 24, 1949), Porterie, D. J., admitted to naturalization a saloon-keeper who had lived in the country since 1903 and had a good reputation, despite the fact that during prohibition he had been convicted by both State and Federal courts of two violations of the Prohibition Acts, and in 1942 had been fined ten dollars for selling liquor on Sunday. The court found petitioner to be of "good moral character," quoting with approval the language of *In re Hopp*, 179 Fed. 561, 562 (E. D. Wisc. 1910), granting naturalization despite violation of the Sunday closing laws in Milwaukee, that "it would not . . . be a fair construction of the act of Congress to require the applicant to rise above his environment and show by his behavior that his moral character was above the level of the average citizen."

Jurisdiction over territorial waters—Seamen's Act applied to foreign vessels

HEROS *v.* COCKINOS. 177 F. (2d) 570.

U. S. Ct. App., Fourth Circuit, Nov. 7, 1949. Parker, C. J.

Libellant Greek seamen hired in United States ports for service on a Greek vessel sued for wages under 46 U. S. C. A. § 599, which forbids advances to seamen on unearned wages and disallows credits against wages for such advances. Here advances had been made to libellants at the time of employment, and deductions made at the end of the voyage, which occurred in Spain. The District Court held that it lacked jurisdiction since the discharge was abroad. On appeal, the court said:

we think it clear that the court had jurisdiction, even though the final voyage of the seamen . . . did not end in the United States. There was a deduction of advances in the United States in violation of our statute, there were settlements made while the vessel was in the territorial waters of the United States, in which these illegal advances were deducted in violation of the same statute; and, finally, the vessel was in waters of the United States at the time suit was instituted. . . . The courts of the United States may not decline the adjudication of a controversy in which the enforcement of our own laws is involved. *Patterson v. Bark Eudora*, 190 U. S. 169, 178.

As for the appellees' reliance on the Consular Convention of 1902 with Greece, 33 Stat. 2122, the court said that this convention

was abrogated in 1916 in so far as it was in conflict with the provisions of the Seamen's Act of 1915, 38 Stat. 1164, and, at all events is superseded by the provisions of that act to the extent of the inconsistency.

War—shipping priority warrants—effect on shipping contracts of ally government

L. N. JACKSON & Co. *v.* ROYAL NORWEGIAN GOVERNMENT. 177 F. (2d) 694.

U. S. Ct. App., Second Circuit, Nov. 10, 1949. Clark, Ct. J.

Plaintiff American company brought action for breach of contract for the carriage of goods by sea, entered into Nov. 7, 1941, with the Director of Shipping of the Norwegian Government, which had requisitioned and was operating the Norwegian ship in question. Defendant had previously filed application with the United States Maritime Commission to submit its ships to the Ship Warrant system of control authorized by Presidential Order of Aug. 26, 1941 (Ex. Order 8871). Shortly after the attack on Pearl Harbor, the contract with plaintiff was broken pursuant to an order from the Maritime Commission. Reversing a judgment for plaintiff, the court held (L. Hand, C. J., dissenting) that the contract was discharged by the order of the United States Government. Although the opinion turned

chiefly upon impossibility of performance as an excuse, the court said with regard to the relation of the Norwegian Government vessels to the United States Government:

Finally the assertion that defendant, as a sovereign power, was not bound to obey the commands of an ally overlooks the realities of defendant's position, as well as the terms of its own commitment. This was a year and a half after the German invasion of Norway. Defendant was then a government in exile. Neither then nor later did it give sign of lack of loyalty to the allied cause; and it was one of the twenty-six countries which on January 2, 1942, subscribed to the "Declaration by the United Nations," as a pledge to pursue a common purpose against a common foe and to cooperate with each other in their common struggle. It was not likely, therefore, that it would join with the three countries of known Fascist sympathies—Argentina, Portugal, Spain—against the vast body of the world's neutral merchant marine, in refusing to accept the Ship Warrants system. Had it done so, the President's power to requisition foreign merchant vessels in American waters had already been granted by the Act of June 6, 1941, c. 174, 55 Stat. 242 . . . and was available for as effective use here as was its operation against, for example, the Danish vessels.

Naturalization—re-acquisition of citizenship lost

PETITION OF DI IORIO. 86 F. Supp. 479.

U. S. Dist. Ct., Mass., Sept. 26, 1949. McCarthy, D. J.

Petitioner was born in Italy of a naturalized American citizen father who, after petitioner's birth, lost American citizenship and re-acquired Italian nationality. Petitioner had both Italian and American citizenship until he lost the latter under Sec. 401 (c) of the Nationality Act of 1940 by voluntarily serving in the Italian Army. He entered the United States on a visitor's visa in 1948 and sought to recover his citizenship under Sec. 317 (a, c) of the Act, which provides that one who lost citizenship by entering a foreign army may, if abroad, enter the United States as a non-quota immigrant for the purpose of recovering citizenship, upon compliance with the Immigration Acts of 1917 and 1924. The court denied naturalization on the ground that there was no legal entry for permanent residence, since petitioner had not entered the country as a non-quota immigrant; the statute was to be narrowly construed.

Expatriation—service in foreign army under duress

YOSHIRO SHIBATA v. ACHESON. 86 F. Supp. 1.

U. S. Dist. Ct., S. D. Calif., Sept. 30, 1949. Metzger, C. J.

The court ordered the cancellation of a certificate of loss of United States nationality which had been issued on the basis of plaintiff's service in the armed forces of Japan during the war, on the ground that such service had been involuntary and under duress. At the time of receiving his notice to report to the military authorities and at all times thereafter, the

court found, "plaintiff believed that he was subject to the conscription laws of Japan and to all orders, notices, rules and regulations promulgated thereunder, and further believed that he would be liable to criminal penalties including imprisonment for failure to comply therewith."

The court further noted that three days after the plaintiff completed his training and reported to a regiment in North China, Japan surrendered and the war ended. "Plaintiff participated in no military action of any kind and his military service consisted solely of military training."

International aviation—constitutionality of issuance of permits to foreign carriers

COLONIAL AIRLINES, INC., v. ADAMS, ET AL. 2 C. C. H. Av. Rep. 15055. U. S. Dist. Ct., District of Columbia, Nov. 16, 1949.

Plaintiffs unsuccessfully challenged the constitutionality of such parts of Sections 402 (b) and 801 of the Civil Aeronautics Act of 1938 (49 U. S. C. A. §§ 482, 681) as relate to permits to foreign air carriers. Acting pursuant to this statute, an international executive agreement had been concluded with Canada,¹ as a consequence of which the Civil Aeronautics Board issued a permit to a Canadian line to fly between Montreal and New York. The three-judge court held, Goldsborough, D. J., dissenting, that under *United States v. Curtiss-Wright Corp.*, 299 U. S. 304 (1936), this JOURNAL, Vol. 31 (1937), p. 334, and *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U. S. 104 (1948), this JOURNAL, Vol. 42 (1948), p. 709, the delegation of powers to the President and Board with respect to foreign air commerce was constitutional.

[Plaintiffs dropped their appeal to the Supreme Court, stating that under present international conditions they did not wish to question the right to make executive agreements. *New York Times*, Feb. 6, 1950, p. 41, col. 1.]

Naturalization—"attached to principles of Constitution"—military service

PETITION OF SCARPA. 87 F. Supp. 366.

U. S. Dist. Ct., E. D. N. Y., Dec. 13, 1949. Galston, D. J.

Naturalization was granted to an Italian who had come to this country in 1930, married an American wife in 1936, was excused from military service in June, 1943, as an enemy alien, petitioned for naturalization in 1948, and stated in his naturalization examination:

I would be willing to fight any country except Italy without being a citizen of the United States . . . if I were an American citizen, I should fight even Italy because that would be my duty.

¹ Canada-U. S. Air Transport Service Agreement, Ottawa, June 4, 1949. Department of State, Treaties and Other International Acts Series, No. 1934 (Publication 8567).

Naturalization—conscientious objector to service aiding military effort
 COHNSTAEDT v. DEPARTMENT OF JUSTICE. 167 Kans. 451; 207 Pac.
 (2d) 425.

Supreme Court of Kansas, June 11, 1949. Thiele, J.

Petitioner appealed from a judgment denying him naturalization, relying on the doctrine of *Girouard v. United States*, 328 U. S. 61 (1946), that an alien who is willing to take the oath of allegiance and to serve in the army as a noncombatant, but who because of religious scruples is unwilling to bear arms in defense of this country, may be admitted to citizenship.

On cross-examination . . . petitioner stated he believed the existence of armed services was not necessary in a Christian nation, and that he was willing to have repealed all laws providing for armed services; that he was not an ordained minister but was a member of the Society of Friends; that he was willing to perform any duty which the government required which did not conflict with his religious beliefs, but that he could not contribute anything to be used solely and directly in furtherance of armed conflict; that he was opposed to sending arms and ammunition to our allies in the recent war; that he was not willing to work in a munitions factory in time of war and assist in manufacture of munitions for the purpose of destroying enemy forces whose aim would be to destroy the armed forces of the United States; that in event of war, if it should be permissible for civilians to remove the wounded from a battlefield he would do so, but he would not deliver ammunition to men at the front who were engaged in combat duty. Other evidence need not be noted.

We think the above makes it clear that petitioner is not willing to serve in the army as a non-combatant, and that he is not entitled to be admitted to citizenship; that the trial court did not err in so concluding, and that its judgment should be and is affirmed.

U. N. representatives—diplomatic immunities and traffic offenses
 CITY OF NEW ROCHELLE v. PAGE-SHARP. 91 N. Y. S. (2d) 290.
 New York, City Ct. of New Rochelle, Aug. 29, 1949. Fasso, J.

The third secretary of the Australian Mission to the United Nations was issued a summons for speeding, and through the United States Mission to the United Nations requested immunity. The court admitted that in a proper case defendant "without question" would be entitled to "diplomatic privileges and immunities accorded by law to diplomatic representatives of foreign nations to the United States of America," being listed "in a booklet issued by the United States Mission to the United Nations . . . as a member of the Australian delegation entitled to diplomatic courtesy." The court held that defendant was, if entitled to immunity, free to refuse to appear in response to the summons. Referring to Sec. 15 of the Headquarters Agreement, this JOURNAL, Supp., Vol. 43 (1949), p. 8, at p. 13, the court said:

The defendant must be accorded, because of this section, the same privileges and immunities that a diplomatic envoy of the United States would receive in Australia. . . . No authority has been cited to the Court that indicates an American diplomat may operate with impunity a motor vehicle in Australia in excess of the speed laws. If the defendant, through the United States Mission, establishes this to be a fact, the Court would be required to dismiss the charge.

. . . If immunity from traffic regulations are included in the term [privileges and immunities], Section 15 would seem to be in conflict with Section 27 . . . for the latter section requires construction of [the Agreement] . . . in the light of its primary purpose. What is the primary purpose of the United Nations Agreement with the United States? It is to promote peace and safety for every person in the world. It recognizes that all individuals have a God-given right, regardless of position or station in life, to peace and to personal safety. Traffic regulations exist all over the world to protect persons and property. It follows that all persons who use motor vehicles are under a strong moral obligation, no matter in what country they operate, to exercise due care and to comply with such regulations so as to achieve the ends for which they have been enacted. No exceptions should be made for high government officials, whether they are American envoys abroad or foreign diplomats in this country. Our democracy is based upon the fundamental concept of equality of justice and equal protection of the laws for all. That same concept conforms with the ideals of the United Nations Organization.

[Note: On Sept. 13, 1949, the charge was dismissed when a communication from the United States Mission stated that defendant had no authority to waive diplomatic immunity; this communication agreed with Fasso, J., that all persons were under a "strong moral obligation" to comply with traffic regulations, and said this was being called forcefully to the attention of United Nations delegates. *The New York Times*, Sept. 14, 1949, p. 33, col. 1.]

Extradition—political or military crimes

ANONYMOUS. 4 Bol. da Soc. Brasileira de Direito Int., No. 7, p. 128.

Brazil, Supreme Court, May 21, 1947.

Defendant Danish subjects were tried and convicted in Denmark on charges of collaborating with the enemy during World War II. They emigrated to Brazil, and Denmark sought extradition. They had been members of a firm which during the German occupation between 1941 and 1945 sold new and used machines, ships, etc., to the German Government and occupation forces. They were tried under Danish Law 259 of June, 1945, making it a crime for any person to collaborate with occupation forces in the capacity of buyer, supplier, or contractor. ✓

A unanimous court refused the request for extradition, holding that the crime was one of a political character and that the Act under which defendants were convicted was *ex post facto*. The court said that, while it ✓

was often difficult to determine what constituted a political crime, it would not be error to include collaboration with the enemy, since the victim was the state in the supreme interests of its defense and sovereignty. Moreover, the Act of 1945 admitted the political nature of the crime in question when it gave "political inclination" as a motive to collaboration. The court concluded that the non-retroactivity of penal law was universal and "of a constitutional foundation," and that here the law was sought to be applied to facts done prior to its enactment.

[Note: The same court reached a similar result in the case of *Viggo Christian Astrup*, *ibid.*, p. 135 (July 9, 1947), granting *habeas corpus* to prevent arrest for extradition at the request of Denmark for the crime of collaboration with the enemy.]

State immunity—friendly armed forces—"acts of sovereignty"

ABOUTABOUT c. ÉTAT HELLÉNIQUE. 1 Rev. Hellénique de Droit Int. (1948), p. 279.

Egypt, Mix. Ct. of First Instance of Alexandria, Jan. 3, 1948. Pres. Modinos.

The court overruled a decision of the Mixed Court of Summary Justice of Alexandria, which had awarded damages to Aboutebout for injuries sustained when his bicycle was struck in Egypt by a Greek Army truck, on the ground that the truck was being operated by the state in its sovereign capacity, as a result of which the determination of liability lay outside the jurisdiction of the Mixed Court.

The theory and practice of the Mixed Courts, adopting the modern tendency which limits the absolute immunity of States . . . has always distinguished between acts of sovereignty or political acts and acts of commerce (*gestion*) or administration which relate to the private domain, retaining jurisdiction only in the latter instance.

War—criminal prosecution of neutral aiding enemy armed forces

WUISTAZ. Dalloz Hebdomadaire, 1949, 1, 193.

France, Cour de Cassation, February 6, 1947.

Under Article 29 of the Regulations on the Laws and Customs of War on Land, annexed to Hague Convention IV of 1907,¹ a citizen of a neutral state, in this case Switzerland, cannot be held guilty of espionage for belonging to the German quasi-military organization, *Todt*, whose uniform he wore. He can, however, be tried by a French military tribunal for denouncing French patriots, under the Ordinance of August 28, 1944, which grants such tribunals jurisdiction to try non-French agents of the enemy for crimes against the laws and customs of war.

¹ This JOURNAL, Supp., Vol. 2 (1908), p. 97.

[*Note:* In the case of *Ernst*, *Dalloz Hebdomadaire*, 1949, 1, 492, a judgment of the *Cour de Cassation* of February 24, 1949, affirmed the conviction of a Swiss national residing in France for trafficking with the enemy, denying a plea that the Ordinance of March 29, 1945, applied only to French nationals. The illicit commerce of which the defendant was accused took place on French territory.]

Consuls—lack of power to validate adoption, even if in Embassy building

ÉPOUX BARAT-TERRILL *c. MIN. PUBL.* *Dalloz Hebdomadaire*, 1949, 1, 368.

France, Tribunal Civil de la Seine, February 10, 1948.

An American couple sought to adopt the illegitimate daughter of a French mother, in conformity with the law of California, their domicile, by registering their intention and the consent of the mother with the American consul at the American Embassy in Paris. They now seek to compel the appropriate French authorities to recognize the adoption. The court denied their request, since they had not complied with the French law on the subject. When any of the parties to an adoption is French, said the court, and especially when the person adopted is French, the policy behind the French adoption laws demands that they be complied with.¹ Further,

The Vice Consul of the United States of America does not have, by the terms of the consular conventions in force, and with regard to French law, any power to effectuate an act of adoption to which the parties are persons of French nationality.

That the act of adoption occurred in the United States Embassy in Paris is of no consequence, said the court, since, in reality, that is within the territory of France and so is subject to French law.

State immunity—component unit of foreign federal state

DAME DUMONT *c. ÉTAT DE L'AMAZONE.* *Dalloz Hebdomadaire*, 1949, 1, 428.

France, Tribunal Civil de la Seine, March 2, 1948.

Plaintiff sued the State of Amazonas, a component unit of the United States of Brazil, to recover the value of various bonds issued by that State and upon which payment had not been made. Judgment was rendered against the State of Amazonas, the court holding that as a component unit in a federal state it was not entitled to immunity from suit:

The right of jurisdiction which belongs to each Government to judge all controversies arising from its own acts is a right inherent in its sovereign authority which another Government could not attribute to

¹ See editorial by Arthur K. Kuhn in this JOURNAL, Vol. 44 (1950), p. 150.

itself without exposing itself to an alteration of their respective relations . . . this rule receives application only to the extent that one can justify invoking it by the existence of a personality independent (*personnalité propre*) in its relations with other countries envisaged from the point of view of public international law; such is not the case of the State of Amazonas, which, deprived of diplomatic representation, does not enjoy, from the point of view of international political relations, any personality of its own.

War—spy's immunity after rejoining army—effect of breach on treaty validity

RIEGER. Dalloz Hebdomadaire, 1949, 1, 193.

France, Cour de Cassation, July 29, 1948.

The court sustained the acquittal of a German national who, after mobilization as a German army officer, had been in France a spy and a recruiter of spies, but had not been apprehended until after he had rejoined the German Army and been demobilized in Germany.

Article 31 of the Regulations on Laws and Customs of War on Land, annexed to Hague Convention IV of 1907,¹ provides that a spy who is captured after rejoining the army to which he belongs is to be treated as a prisoner of war. Rejecting the contention that this rule was inapplicable in view of repeated German violations of the Hague Regulations, the court said:

International conventions are the acts of high administration which can be interpreted, if at all, only by the powers between whom they are made; but it is the function of Courts to apply them when, as in this case, their meaning and applicability does not present ambiguity.

Consuls—no immunity from civil jurisdiction

ROBE c. ÉTAT FRANÇAIS ET MAXIMOFF. Dalloz Hebdomadaire, 1949, 1, 88.

France, Cour d'Appel d'Alger, November 18, 1948.

Robe appealed from a decision refusing the expulsion of Maximoff, a consul, from a house he held in his personal capacity, as provided for by law. This refusal was apparently based solely upon Maximoff's being a consul. The case was reversed and remanded, the court saying:

In France this immunity for foreign consuls is solely in matters of misdemeanor (*matière correctionnelle*), and is not applicable in civil matters or those relating to felonies; the cases hold that consuls are subject to the local tribunals for acts which they perform or obligations which they contract or which fall upon them in their personal capacity.

¹ This JOURNAL, Supp., Vol. 2 (1908), p. 97.

*Jurisdiction—treason abroad by domiciled alien member of army**REX v. NEUMANN*. [1949] 3 South African L.R. 1238.

Union of South Africa, Spec. Crim. Ct., Transvaal, Oct. 16, 1946.

Murray, J.

Defendant, a native-born German national, came to the Union of South Africa some years before the outbreak of war in 1939, acquired domicile there, married a Union national, and took steps toward naturalization. He did not complete naturalization, however, and in 1940 enlisted in the South African Army, serving in Ethiopia and Cyrenaica, where he was captured by German forces. Thereafter he was alleged to have worn a German uniform and to have interrogated Union and Allied prisoners of war for the German Army. He was charged with treason, and pleaded to the indictment, and thereafter for discharge at the end of the Crown's case, contending that the court lacked jurisdiction over his offense because it was committed abroad, and that as an enemy alien he could not be guilty of treason. Both pleas were rejected, the court saying in part:

when it is emphasized that the punishment of high treason is the outstanding method of preservation of the very existence of the Sovereign State, it would, we think, follow that the actual place of commission of the treasonable act can have no bearing on the nature of the crime as constituted by the common law of that State . . . no question of international law or the comity of nations requires a State to refrain from punishing persons who owe it allegiance, merely because the allegiance is breached in the territory of another State. For the latter State has neither right nor duty to punish a crime, committed within its area but against another sovereign state; it is the last-mentioned state, and that state alone, which is concerned with the punishment of the crime . . . [citing *Rex v. Casement*, [1917] 1 K.B. 98; *Joyce v. Director of Public Prosecutions*, [1946] A.C. 347.]

Citing *Rex v. de Jager*, [1907] A.C. 326; *Rex v. Boers*, 21 Natal L.R. 121, and *Rex v. Prozesky*, *ibid.*, 216 (1900), the court stated that "an alien may in consequence of residence within a State and the enjoyment of the protection of that State, incur a debt of allegiance to that State, breach whereof renders him liable to the penalties of high treason." As to the duration of such temporary allegiance, the court added:

Without doubt, then, allegiance is required of a resident alien while he himself is physically present in this country. Such allegiance does not, in my view, immediately terminate as soon as he departs from the country . . . where it is clear that his departure is of a purely temporary character, accompanied by a definite intention to return for permanent residence, the protection previously acquired does not cease on departure. Any uncertainty on this point . . . appears to disappear when his departure is permitted or facilitated by some positive act on his part, as in *Joyce's* case *supra*, whereby he secures the extension, beyond the territorial limits of the country of residence,

of the protection which he enjoyed in that country, and in return for which he incurred the *subjectio* referred to . . . when the accused left the country temporarily in consequence of his enlistment as a soldier in the Union Forces, his existing allegiance continued precisely in the same way as if he had left the country after securing a Union passport.

As to the claims to allegiance by Germany and by South Africa, the court held that:

even after capture by the German forces the accused was obliged to do nothing *voluntarily* to impair the safety of the Union or participate in any attack on the Union. If, while in German hands, he remained passive, he would not be committing a breach of his allegiance to the state of his birth, nor, obviously, to the Union of South Africa . . . the question still to be ascertained is whether such otherwise treasonable acts as the accused performed after capture were performed voluntarily or under compulsion from the German authorities.

CASES NOT DIGESTED

Aliens—deportation:

U. S. ex rel. Lee Wo Shing v. Watkins, 1949 A. M. C. 1377 (Ct. App. 2d, June 7, 1949).

U. S. ex rel. Pirinsky v. Shaughnessy, 177 F. (2d) 708 (Ct. App. 2d, Sept. 30, 1949).

Kavadias v. Cross, 177 F. (2d) 497 (Ct. App. 7th, Oct. 25, 1949).

Sleddens v. Shaughnessy, 177 F. (2d) 363 (Ct. App. 2d, Oct. 27, 1949).

Yanish v. Phelan, 86 F. Supp. 461 (N. D. Calif., Sept. 23, 1949).

U. S. ex rel. Giacalone v. Miller, 86 F. Supp. 655 (S. D. N. Y., Oct. 14, 1949).

U. S. ex rel. Ullah v. Shaughnessy, 87 F. Supp. 38 (S. D. N. Y., Nov. 25, 1949).

Aliens—exclusion:

Kaminer v. Clark, 177 F. (2d) 51 (Ct. App. D. C., July 11, 1949).

U. S. ex rel. Teper v. Miller, 87 F. Supp. 285 (S. D. N. Y., Dec. 1, 1949).

Aliens—miscellaneous:

Llanos-Senarillos v. U. S., 177 F. (2d) 164 (Ct. App. 9th, Oct. 3, 1949).

In re Krajeirovic, 87 F. Supp. 379 (D. Mass., Dec. 22, 1949).

In re Estes, 87 F. Supp. 461 (N. D. Tex., Dec. 22, 1949).

Effect of foreign nationalization decrees—no proof of Soviet Estonian law:

The "Jaak" and Other Estonian Vessels, 83 Lloyd's List L. R. 45 (G. B. Shipping Cl. Trib., July 15, 1949).

Enemy aliens—removal—war continuing despite end of hostilities:

U. S. v. Shaughnessy, 177 F. (2d) 436 (Ct. App. 2d, Nov. 7, 1949).

Enemy alien—action for false arrest as:

Gregoire v. Biddle, 177 F. (2d) 579 (Ct. App. 2d, Oct. 24, 1949).

International aviation—Chicago Interim Agreement:

Lehnertz et al. v. S. A. Belge &c., 2 C. C. H. Av. Rep. 14797 (S. D. N. Y., May 19, 1948).

International organization—capacity to sue:

Int. Refugee Org. v. Bank of America Nat. Trust & Sav. Assn., 86 F. Supp. 884 (S. D. N. Y., July 18, 1949).

Jurisdiction—law applicable to merchant vessels:

Avgoustis v. Erini Shipping Co., 177 F. (2d) 461 (Ct. App. 2d, Nov. 7, 1949).

Taylor v. Atlantic Maritime Co., 86 F. Supp. 496 (S. D. N. Y., June 7, 1949).

Chinchilla v. Foreign Tankship Corp., 1949 A. M. C. 2104 (City Ct., N. Y., June 20, 1949).

Naturalization—cancellation:

U. S. v. Bridges, 86 F. (2d) 931 (N. D. Calif., Oct. 12, 1949).

Naturalization—"good moral character"—Mann Act violation:

Petition of Reginelli, 86 F. Supp. 599 (D. N. J., Oct. 11, 1949).

Naturalization—indictment for false swearing in connection with:

U. S. v. Bridges, 86 F. Supp. 922 (N. D. Calif., Oct. 12, 1949).

Seamen—cure and maintenance under International Labor Convention:

Robinson v. U. S., 177 F. (2d) 582 (Ct. App. 5th, Nov. 18, 1949).

War—Alien Property Custodian and enemy property:

McGrath v. Manufacturers Trust Co., 338 U. S. 241 (Nov. 7, 1949).

J. Kahn & Co., v. Clark, 178 F. (2d) 111 (Ct. App. 5th, Dec. 2, 1949).

Heyden Chem. Corp. v. Clark, 85 F. Supp. 949 (S. D. N. Y., Oct. 23, 1948).

Paramount Pictures v. Clark, 209 Pac. (2d) 968 (Cal. App., Sept. 29, 1949).

Gausebeck v. Pallante, 66 Atl. (2d) 550 (N. J. Superior Ct., June 6, 1949).

In re Blau's Estate, 67 Atl. (2d) 316 (N. J. Superior Ct., July 1, 1949).

Singer v. Yokohama Specie Bank, 299 N. Y. 113 (April 14, 1949).

In re Carrington's Estate, 90 N. Y. S. (2d) 757 (Surr., N. Y. Co., June 2, 1949).

In re Lustgarten's Estate, 91 N. Y. S. (2d) 907 (Surr., N. Y. Co., July 8, 1949).

In re Franke's Estate, 92 N. Y. S. (2d) 19 (Surr., N. Y. Co., July 29, 1949).

BOOK REVIEWS AND NOTES

The British Year Book of International Law, 1947. Royal Institute of International Affairs. London, New York, Toronto: Oxford University Press, 1949. pp. xiv, 529. Index.

In this twenty-fourth volume of the *British Year Book of International Law* M. E. Bathurst presents a descriptive analysis of proposals before the United Nations for the control of atomic energy in an article entitled "Legal Aspects of the International Control of Atomic Energy." H. Duncan Hall contributes a thought-provoking analysis of "The Trusteeship System" in a wider frame of reference than that in which it is ordinarily considered. In "International Organization and Neutrality," J. F. Lalive, a Swiss national, concludes that "both in theory and in practice there was room left for neutrality" in the League of Nations and in the United Nations, and suggests that the United Nations might find it possible to admit Switzerland to membership without impairing her status of permanent neutralization and without injury to the United Nations. P. O. Humber has written a useful study on "Admission to the United Nations." A. B. Lyons continues in "The Conclusiveness of the 'Suggestion' and Certificate of the American State Department" the valuable series on the procedural aspects of presenting claims of immunity which he commenced in the 1946 *British Year Book of International Law* on "The Conclusiveness of the Foreign Office Certificate" and has followed in the 1948 volume by "Conclusiveness of the Statements of the Executive: Continental and Latin-American Practice." Miss Joyce Gutteridge, in "Immunities of the Subordinate Diplomatic Staff," supports the suggestion of Article 23 of the Harvard Research Draft Convention on Diplomatic Privileges and Immunities that the administrative personnel require diplomatic immunities only to the extent that they are engaged upon the business of the mission. In "Prize Law During the Second World War," S. W. D. Rowson provides the first comprehensive analysis of prize law in the second World War. Dr. Yuen-li Liang makes a valuable contribution in "The Settlement of Disputes in the Security Council: the Yalta Voting Formula."

Other articles include "The Release of the *Altmark's* Prisoners" by C. H. M. Waldock; "German External Assets," by F. A. Mann; "Private Property, Rights, and Interests in the Paris Peace Treaties," by Andrew Martin; "State Succession in the Matter of Treaties," by J. Mervyn Jones; and "The Progressive Development of International Law and Its Codification," by R. Y. Jennings. Clive Parry continues his documentary section

on the constitutions of international organizations. The volume also contains several notes, book reviews, and digests of court decisions.

The British Year Book of International Law has increased its stature under the able editorial direction of Professor H. Lauterpacht and is performing a valuable service to both scholars and practitioners.

HERBERT W. BRIGGS

Studi Sui Diritti Reali Nell'Ordinamento Internazionale. By G. M. Ubertazzi. Milano: A. Giuffrè, 1949. pp. vi, 194. L. 550.

In most civil law countries legal rights have been traditionally subdivided into *diritti reali* (*droits réels, dingliche Rechte*) and *diritti di obbligazione* (*droits d'obligation, Obligationen Rechte*). This distinction, for which there is no precise equivalent in Anglo-American law, has been repeatedly criticized as indefinite, artificial, and valueless. The purpose of Dr. Ubertazzi's study is to assert and clarify the distinction between the two classes of rights and to demonstrate that it also finds useful application in the field of international law.

According to the author, *in rem* rights (we use this expression in the absence of any better one) are those which establish an immediate and direct dominion of a person over a *res*, coupled with the corresponding duty of all other persons to refrain from interfering with the exercise of such right. *In rem* rights, the author contends, also exist in the field of international law. The jurisdiction of a state over its territory is in the nature of an *in rem* right; so is the right of the state to exercise its authority over its own citizens. The class of international *in rem* rights also comprises in the author's opinion the right of a state over such different classes of *res* as warships and private vessels, diplomatic and consular archives and records, fisheries and military equipment abroad. *In rem* rights of a different nature may co-exist on the same *res* for the benefit of different international persons. This happens, for instance, in the case of international servitudes and of international leases of territory. *In rem* rights may be held in common by several international persons, as in the case of an international condominium. Furthermore, *in rem* rights may belong, according to the author, to international persons other than states, such as the Holy See and the United Nations. In support of his views the author relies not only on legal writings, which is usual with Italian jurists, but also on the analysis of international situations. With many of the author's contentions it would be possible to take issue; many cases cited in support of his view could be differently explained. Yet this is an interesting and provocative work which shows considerable diligence and careful research.

ANGELO PIERO SERENI

Los Principios Generales de Derecho como Fuente de Derecho Internacional. By Eulalia Alcalá Carrera. México: Facultad Nacional de Derecho y Ciencias Sociales, 1948. pp. 96.

This excellent survey of one of the most interesting problems of international law comes in the form of a dissertation presented to the Faculty of Law and Social Science of the National University of Mexico by a candidate for the degree of *licenciado en derecho*. It analyzes the terms of Article 38 of the Statute of the International Court of Justice, which calls upon the Court to apply, as a source of international law, following conventions and international custom, "c. the general principles of law recognized by civilized nations." After an examination of the scope of these principles in terms of the theory of international law, Señorita Alcalá Carrera goes on to show that, in spite of the limitations of international law in relation to the settlement of controversies, the general principles of law have actually served upon many occasions as a basis of judicial decision. Three classes of general principles are set forth: principles derived directly from the idea of justice, such as the rule of good faith; principles implicit in the conception of a juridical institution, such as the principle of free consent in the making of a treaty; and principles affirmed by positive law. The author has done her task so well that it is to be hoped that she may be encouraged to develop the subject still further and elaborate many points of doctrine and of practice which are treated in all too summary form.

C. G. FENWICK

The Relativity of War and Peace. A Study in Law, History, and Politics.

By Fritz Grob. New Haven: Yale University Press, 1949. pp. xviii, 402. Indexes. \$5.00.

The volume under review, to which Roscoe Pound has written a charming preface on semantics, is the outcome of many years of study dedicated by the author to find out what war is. His first finding is that the terms commonly applied and the definitions commonly adopted are entirely unsatisfactory. This was, of course, fully known to all students of the laws of war and is, for example, laid down in the reviewer's *Treatise on the Laws of War and Neutrality* (1935), where also the principal historical episodes, so baffling as to what war is, are quoted.

The first merit—and a great merit—of this book is an extremely detailed and painstaking historical, political, and juridical investigation of these baffling episodes. Thus the American naval operations of 1798–1800, the battle of Navarino of 1827, the French operations against Annam and China in 1882–1885, the Boxer Expedition of 1900–1901, the Manchurian Conflict of 1931–1933, the "China Incident" in 1937–1941, and many others, are carefully studied, making use of abundant material.

But these investigations serve only as the basis for the theoretical and legal section. The author reaches, in his critique, the conclusion that there is no such thing as "a state of war" or "war in the legal sense." In consequence, all definitions, hitherto adopted, are wrong and, what is more, necessarily wrong.

In the constructive part of the book the author adopts the thesis of relativity: "The particular rules are calculated to serve particular functions." The word "war" in each rule must be interpreted accordingly (p. 189). We need, therefore, a variety of definitions of war. The author follows here the "instrumentalist," "functional" approach of W. W. Cook, although he does not seem to be aware of it. The criticism of this approach is the same which applies to Cook's approach. This approach threatens to destroy all rules of law. According to the author, some rules of the laws of war come into action at the slightest provocation, others more slowly. War comes and passes, therefore, by stages. But the question must be asked not only whether, if there is fighting and therefore to that extent war, the rules of war apply. On the contrary there is often fighting and the question arises: Do the laws of war apply? Take the example of civil wars, the fighting between the Jews of Palestine and the Arab states, which only later agreed that the rules of war should apply to their fighting.

"Legal thinking," states the author, "is not done for academic, but for practical purposes." The book is certainly interesting and has its merits but we may have our doubts as to both its theoretical and practical value. Having finished reading this volume with its attacks against "a state of war" as something that does not exist, this writer read in the *New York Times* a report that the three Western Allies had started diplomatic negotiations with a view to bringing to an end "the state of war with Germany."

JOSEF L. KUNZ

Charter of the United Nations: Commentary and Documents. (2d ed.)

By Leland M. Goodrich and Edvard Hambro. Boston: World Peace Foundation, 1949. pp. xvi, 710. Documents. Index. \$4.75.

To the many students who have found the first edition of this volume a useful handbook and guide to an understanding of the Charter of the United Nations the revised edition will be found doubly so. For the authors were dealing in their first edition with the Charter of an organization which had not yet begun to function; with principles which were still to be put into practice; with institutions which were planned to accomplish certain objectives but had not been subjected to the test of meeting actual conditions of international life. In this second edition the authors have been able to draw upon the experience of some three years of what they properly describe as "constitutional practice"; and, while that practice is

developing so rapidly that a commentary such as this cannot possibly be kept strictly up to date, nevertheless the authors have laid a solid foundation upon which students may readily build with the official material made available to them by the United Nations itself.

Perhaps it is unfair to express the wish that the authors might have made their study a more critical one, but doubtless they have chosen wisely to limit this second edition to an objective study of "what the Charter meant to those who wrote it and what it has come to mean in the practice of the United Nations." To American students *The Federalist* is immensely valuable as a contemporary interpretation of the Constitution, even though on some points it was soon outdated by political practice and decisions of the Supreme Court.

Students of inter-American affairs may draw many parallels between the Charter of the United Nations and the Charter of the Organization of American States adopted at Bogotá in 1948. How does the principle of non-intervention as expressed in Chapter II of the United Nations Charter compare with the statement of the principle in the inter-American Charter? Is the principle of collective security dominant in both cases over a claim by a state of domestic jurisdiction? How do the powers of the Security Council of the United Nations compare with the powers of the Meeting of Consultation of the Ministers of Foreign Affairs, or with the powers of the Council of the Organization of American States when acting as a provisional organ of consultation? Are the recommendations of the General Assembly of the United Nations, made in pursuance of Articles 10, 11, 13, and 14 of the Charter, of greater or less legal validity than those of a Conference or Meeting of Consultation of the Ministers of Foreign Affairs of the American States?—to mention but a few of the questions that come to mind.

The volume closes with a section of documents, a select bibliography, and a highly useful index.

C. G. FENWICK

History of the United Nations War Crimes Commission and the Development of the Laws of War. Compiled by the United Nations War Crimes Commission. London: His Majesty's Stationery Office, 1948. pp. xx, 592. Appendices. Index. 30 s.

The United Nations War Crimes Commission, established at a diplomatic conference of seventeen nations held at the British Foreign Office on October 20, 1943, held its first official meeting on January 11, 1944, and closed its labors on March 31, 1948. It was responsible for drawing up, in accordance with the Moscow Declaration of October 30, 1943, eighty "Lists of War Criminals, Suspects, and Witnesses," and examined 8,178 cases involving 36,810 persons. "Thereby ended an unrelenting four-

year effort to record and investigate the story of Axis war criminality preceding and during World War II, and to assist in bringing to justice the perpetrators of that criminality" (p. 476).

According to Lord Wright, who, in January, 1945, succeeded Sir Cecil Hurst as Chairman of the Commission, the *History* is the result of a composite effort, based upon a plan drafted by M. de Baer and Dr. E. Schwelb, who, however, had no share in the writing of it. Mr. Earl W. Kintner, Deputy United States Commissioner from December, 1945, acted as Editor after October, 1947.

Of the fifteen chapters four summarize the development of the laws of war and of the concept of war crimes from 1856 to 1943. Three chapters survey the composition of the Commission, its terms of reference, its activities, and, in particular, its work on questions of substantive law. The subsequent four chapters discuss specifically developments in the concepts of war crimes, crimes against humanity and against peace, developments in the doctrine of individual responsibility, of acts of state, of immunity of heads of state and of superior orders, the development of law respecting criminal groups and organizations, and, finally, the development, since 1918, in procedure of trying war criminals. Machinery for the tracing and apprehension of war criminals and arrangements for their surrender are also discussed as is the work of one of the principal committees, the Committee on Facts and Evidence, upon which devolved the duty of drawing up a catalogue of war crimes, sifting the evidence submitted by national offices in the participating countries concerning persons accused or suspected as war criminals, determining whether a *prima facie* case existed, and finally, preparing the Lists mentioned above. Several appendices furnish detailed information on various points, including statistics on war crimes trials in Europe and the Far East and a list of "some noteworthy war criminals" with date, place, and court of trial and the sentence imposed, both in Europe and the Far East. There is also a useful bibliography and a serviceable index.

There is no need to recapitulate here Lord Wright's well-known views on some of the controversial aspects of the recent war crimes trials which he has expounded elsewhere and which reappear in this volume. It is interesting to note, however, that, while he continues to affirm, as did the International Military Tribunal, that the distinction between just and unjust wars "was indeed a moral and a political principle which had acquired the status and definiteness of a principle of international law and was by 1939 ripe for enforcement" (p. 10), the Commission itself was by no means always clear or unanimous on this crucial point. In fact the Commission encountered serious obstacles when, in March, 1944, at the suggestion of the Czechoslovak member, it took up the question whether aggressive war constituted a criminal act. At first "the criminal nature of the last war (World War II) was found to derive from its aims and (totalitarian)

methods" (p. 180) rather than from its disregard of the Kellogg-Briand Pact. It was also proposed to include aggressive war under "war crimes in the wider sense." The Commission did not accept this proposal but referred it to a subcommittee of experts. There the British expert, Sir Arnold McNair, argued *de lege lata* and in the absence of any judicial or arbitral precedent, that "the State cannot be the subject of criminal liability," that this position was not altered by the Kellogg-Briand Pact which has not "abolished war as an institution regulated by law," and that even if aggressive war "was a crime, it was certainly not a 'war crime'" (p. 181). Over half of the members of the Commission, including the United States, The Netherlands, France, and Greece, supported McNair's position, whereas the delegates from Australia, China, New Zealand, Poland and Yugoslavia supported the Czechoslovak view.

Lord Wright disagreed with "the majority's interpretation of the nature of the *lex lata* in international law" and argued that the Kellogg-Briand Pact declared "war as illegal, and consequently a criminal act," and that this "was recognized by a general consensus of authoritative opinion" (p. 183). Perhaps the records of the Commission would reveal some particulars about this "general consensus of authoritative opinion" which obviously did not include Sir Arnold and his supporters. Without resolving the profound difference of opinion the Commission at a later date, on January 30, 1946, declared that crimes against peace as well as against humanity referred to in the London Agreement of August 8, 1945, "were war crimes within the jurisdiction of the Commission" (p. 187). The crucial decision, however, was not reached in the Commission but was made for it by the four governments signatories of the London Agreement, including, it will be noted, the Governments of the United States, the United Kingdom, and France, whose experts on the Commission maintained a very different point of view indeed.

The *History* is invaluable in presenting materials concerning, and an analysis of, all or at any rate most of the problems of law and procedure dealt with by the different war crimes tribunals and particularly the International Military Tribunal up to about 1947/48. The volume makes no easy reading. The arrangement might be improved upon. Though there is some overlapping and duplication, the wonder is that there is not more of it in view of the pressure under which it had to be completed and of the fact that it is the work of several experts. The reviewer may be mistaken in feeling that somewhere between the lines there are traces of a restrained sense of frustration, for much of the useful work accomplished by the Commission received but scant consideration from the governments whose agency it was. It is one of the mysteries of our time, which has seen a mushroom-like growth of international agencies, that the governments which create them subsequently make no better use of them. One must be very grateful to Lord Wright and the small band of experts who are the

authors of this *History* for their perseverance under adverse circumstances and for their skill in bringing together largely inaccessible materials of great significance. They may rest assured that their work, which is described by Lord Wright with characteristic understatement as "little more than a preparatory study," will become an indispensable source and guide for the study of the problems of war crimes in all their ramifications.

LEO GROSS

Debellatio nel Diritto Internazionale. By Ludovico Matteo Bentivoglio. Pavia: University Press, 1948. pp. 100. L.300.

The author devotes exactly 100 pages to determine the exact meaning of the *debellatio* from the viewpoint of international law and finally reaches the conclusion that it consists of the extinction of a state, that is, the termination of its sovereign power over its territory and population as a result of defeat in war. According to the author, *debellatio* is the necessary premise and justification for the annexation of the territory and population of the defeated country on the part of the victor; the latter may, however, refrain from conquering or incorporating the territory and population of the defeated country. While the author shows a remarkable knowledge of the many studies on this interesting topic, there is not one reference in his work to international practice, nor does he draw any practical conclusion from his findings. The work therefore seems to revolve in substance around a mere question of legal terminology.

ANGELO PIERO SERENI

Les Mesures Coercitives sur les Navires de Commerce Étrangers, Angarie-Embargo—Arrêt de Prince. By Julien Le Clère. Paris: Librairie Générale de Droit et de Jurisprudence, 1949. pp. 190. Fr. 500.

The book under review is a valuable monograph, giving a detailed investigation of the three institutions of angary, embargo, and *arrêt de Prince*. All the three are ancient institutions, consecrated by customary international law, doctrine, and court decisions. The author gives an exhaustive study with regard to each of the three institutions—their name, a survey of the practice, doctrine, treaties, and judicial decisions, both international and national, from the sixteenth century to the present day—based on the literature in all the Western languages, and giving their characteristics, the conditions under which they can be legally exercised, and their effects.

The *arrêt de Prince* consists only in the temporary prohibition, whether in time of peace or war, to merchant vessels (or planes) to leave port or territorial waters. It is founded in the police power of the sovereign state;

it is objectively exercised, has no hostile character, carries no right to indemnity; for purposes of private law it constitutes a case of *force majeure*. The author admits that its exercise in this century is very rare.

Very different is the embargo, exercised in this century only in time of war; it can constitute the preparation of a later angary. It has an unfriendly, even hostile character; it is practically accompanied by coercive measures; does not constitute a confiscation, but carries no right to indemnity; it always discriminates against certain flags. It is a measure of reprisals, a survival from the earlier *lettres de représailles*.

Again entirely different is angary. It is a formless authoritarian requisition, whether in time of peace or war, of the use of foreign merchant vessels in case of absolute necessity. A requisition of foreign ships under construction (U. S.—Norway, 1919) is not angary. Its conditions are: exercise by a sovereign state only in case of absolute necessity (the subjective appreciation is a weakness); an authoritarian act, it does not extend to the crew, comports a change of the flag, gives right to an indemnity for the use and return, or to indemnity in case of loss; can be exercised in time of peace and war (today practically exercised only in time of war), and, in the latter case, by belligerents as well as by neutrals. All these characteristics clearly distinguish angary not only from the other two institutions, but also from capture under prize law and from normal requisition.

The principal effort of the author is directed toward ending the confusion between the three concepts. He further emphasizes that the two world wars have brought about an exercise of the right of angary in proportions never dreamed of before, and an extension to its exercise by neutrals, not only toward belligerents but also toward other neutrals. The abolition of these institutions, as once proposed by the *Institut de Droit International*, is a vain hope. The author thinks that international treaties regulating the fixing and procedure of payment in case of angary would be desirable, but admits that even this is only a pious wish.

JOSEF L. KUNZ

L'Occupazione nel Diritto di Guerra. By Francesco Capotorti. Naples: Eugenio Jovene, 1949. pp. 214. L. 700.

Notwithstanding the neglect of the laws of war since 1920, both by states and by jurists, the many wars since 1920 and the two world wars, the present chaotic status of the laws of war and the conclusion that war is not abolished, have again produced a new literature in this field. The problem of belligerent occupation holds a prominent place. It is also the subject of the book under review, written by a younger member of the

Italian school of international law, who fully shows the virtues and also shares the unacceptable dualistic approach of this school.

The author starts from the *occupatio* of Roman law as to *res nullius*, to which the *res hostiles* were assimilated. He admits that up to the nineteenth century, belligerent occupation was considered equivalent to conquest, although a certain differentiation between these two institutions can already be found theoretically in Grotius, Gentile, Puffendorf, and Vattel. Only after the time of Heffter was belligerent occupation as such fully elaborated and distinguished from conquest as well as from mere invasion. Studying the theories as to its legal nature, the author correctly rejects the conception of belligerent occupation as a mere fact or as a substitute exercise of the sovereignty of the occupied state. He stands on the basis of the correct theory: the occupant exercises a right of his own, based simply on military occupation and having its legal title directly in international law, which also regulates the content, the purpose, and the limitations of this right.

Later chapters are devoted to a detailed study and analysis of the rights and duties of the occupant and of the occupied state. Many novel problems are here treated: the status of the "governments-in-exile," the setting up of "Quisling governments" by the occupant, the annexation of occupied territory *durante bello* (Dalmatia, Ljubliana), the setting up of new states (Croatia). In his attempt to draw a dividing line between total belligerent occupation and *debellatio* the author takes the same attitude as other recent Italian writers (Bentivoglio, Giuliano). According to him, Germany has been conquered and has ceased to exist; the war was over in 1945; as the victors did not annex it, the occupying Powers now exercise their activities legally in *terra nullius*. But this construction is certainly not tenable, as it is in full contradiction to the acts and statements of these occupying Powers.

In the last chapter the author makes an attempt to distinguish, as far as the belligerent occupations of the two world wars are concerned, between mere violations of law and possible new norms *in fieri*. He gives a detailed analysis of three cases: the Germans in Belgium 1914-1918, the Germans in Holland 1940-1945, and the English and Americans in Italy 1943-1945. As a conclusion of these three case studies, however different, the author notes the enormous expansion of the activities of the belligerent, the appearance of new and very far-reaching phenomena, such as the emission of a special "occupation currency." This study shows that the Hague law on belligerent occupation is today archaic and in urgent need of revision. The study is, in general, a competent and valuable monograph.

JOSEF L. KUNZ

The Tree of Battles of Honoré Bonet. An English version with Introduction by G. W. Coopland. Cambridge, Mass.: Harvard University Press, 1949. pp. 316. \$6.00. Appendices. Indexes.

L'Arbre des Batailles was written in 1386 and at least 50 manuscripts of it are extant, together with a translation into Scots by Gilbert of the Haye in 1456 and a modern print of the original French issued by the historian of international law, Ernest Nys, in 1883. This English version by a competent medievalist is an interesting addition to the literature on the international law of war, though the primary purpose of Professor Coopland was to bring out an edition of this most popular work on the conduct of knights when knighthood was actually in flower. The editor completes the customary text by printing, in its French version, an Historical Interpolation which appears in three of the fifty manuscripts he examined and which is based upon a manuscript in his possession.

The student of international law will find in Books III and IV of the *Tree of Battles* a popularization of the *Tractatus de Bello, de Represaliis, et de Duello* of Giovanni da Legnano, which was issued in 1360 and was put into English by the late Thomas E. Holland in the *Classics of International Law* series in 1917. To all intents and purposes Bonet rewrote Legnano, putting that Bologna lawyer's conclusions in concrete form for ready assimilation by the knights of the period. Bonet was the Prior of Salon (Basse-Alpes) and naturally introduces a good deal of religious comment. The substance of his text is essentially that of Legnano. But instead of handling the material in a formal order he treats his subject as a series of precise problems. His chapters are short and answer specific questions, such as: "Whether in time of war the ass should have the privilege of the ox"; "Whether a place can be taken by escalade in time of truce"; "Whether a Christian King can give safe-conduct to a Saracen King"; "Whether a wager of battle can be fought before a Queen"; "Concerning the cases in which it is permissible to give wager of battle." Approximately 140 chapters answer such positive questions and the reader is impressed with the fact that the principles on which conclusions were based 560 years ago are substantially those which are advocated now.

Bonet is readable and worth reading for one interested in seeing the medieval mind at work or in studying its attitude toward the conduct of war as the 14th century knew it.

DENYS P. MYERS

The Trade of Nations. By M. A. Heilperin. New York: Knopf, 1947. pp. 234.

A Foreign Economic Policy for the United States. By Seymour E. Harris (ed.). Cambridge, Mass.: Harvard University Press, 1948. pp. 483.

These two books are particularly significant, in view of the so-called "dollar shortage." Furthermore, they are both intended primarily for the intelligent general reader, rather than for the technician, and are not couched in unintelligible hieroglyphics.

Heilperin's book is, in some respects, almost a modern version of Adam Smith's *Wealth of Nations*, so far as international trade and finance are concerned. It constitutes an outstanding exposition of the requirements of a multilateral trading system in mid-twentieth century. Some might call it "unrealistic" or "outmoded." Others, however, would characterize it as a return to international economic sanity. The book of which Professor Harris is the editor is a symposium, mostly of factual articles pertaining to geographical areas, international organizations, and the European Recovery Program. Part V delves into the highly significant and timely problem of international economic disequilibrium. Most significant are the articles on the "dollar shortage" by Professor Haberler of Harvard and Dr. Balogh of Balliol.

Dr. Heilperin's book calls for immediate action on the part of the United States to save the day for multilateral international trade against the economic nationalism which has been accentuated by the war. Heilperin contends that the only way to world-wide prosperity is to return to the multilateral trade practices of the 19th century. This is essential since economic nationalism emphasizes "the sovereignty of individual states," has a "dissolving effect upon international relations," breeds "ill will and conflict," creates "chaos . . . upon which aggressor states thrive, contributes to world economic distress" and is unable to provide prosperity.

Proposals for an International Trade Organization are praised only to the extent that they promote multilateral trade among the nations. Associated with multilateral trade is the free private enterprise system of the United States and associated with barter are the collectivist societies with their state trading monopolies. No basic compromise between the two is possible. The International Bank and the International Monetary Fund are examined and approved, for the most part, as far as they go.

The "Proposals for the Expansion of World Trade and Employment" (and, hence, the Havana Charter for an International Trade Organization, which appeared subsequent to the appearance of the book) is, on the other hand, "essentially a compromise." It would create "one trade agency of the United Nations and one agreement that all countries, regardless of their economic systems, must sign." This is a great error, for "the future relationship between free-market and state-controlled economies is the greatest international economic issue of our time. . . . It is better to recog-

nize these existing divergencies and build a world organization on that basis rather than to cover them up with broad formulae, and, in the process, risk destroying the free-market system altogether."

With the fundamental propositions that the world needs freer trade relations for the benefit of all; that the United States is in a particularly advantageous position to promote freer trade provided it is willing to pay the price; that to do this effectively means a departure from our high protective tariffs and the granting of huge loans; that there should be an international authority to lay down trade rules which can be enforced; that "international planning" must be supreme; that unless we do these things only disaster can result; all these the author demonstrates to be correct. He has not proved, however, that we must split the world into free-trade and state-controlled areas. That "national economic planning" inevitably leads to collectivism (as opposed to democracy) and hence to barter as opposed to multilateral trade, is mere assertion.

The last two chapters of the Harris volume provide a useful theoretical guide to the current debate on "dollar shortage." Haberler's view is essentially orthodox and even classical. According to this approach the phenomenon will disappear if only the principal trading countries would abandon their habits of bilateral balancing and return to the principle of comparative advantage in international trade. National inflationary policies, unbalanced budgets, and a persistent unwillingness on the part of many countries to live within their means are the villains in the piece. Once they are vanquished the world can return to the normality of multilateral trade and convertibility of currencies.

To Dr. Balogh, on the other hand, the problem of international disequilibrium is less soluble and more in the nature of a permanent, rather than a transitory, phenomenon. From this point of view the position of the United States—an economic giant in a world of lesser Powers—is dominant and determining. Instability in the United States is immediately transmitted to other countries, but instability there need not affect the United States economy to any appreciable degree. And, if the United States shows no disposition toward the "import-mindedness" that Great Britain, in her own self-interest at the time, manifested in the 19th century, there is little reason to expect that automatic international equilibrium can again be attained. The self-adjusting mechanism of the 19th century worked because it was to the interest of every important nation, particularly Britain, to make it work. It is not so clear that the same conditions and circumstances are applicable in the world today.

HOWARD S. PIQUET

NOTES

Rénovation des Bases de la Vie des Peuples. By Alejandro Alvarez. Paris: Éditions France-Amérique, 1948. pp. 168. The indefatigable Chilean jurist, now a member of the International Court of Justice, who has made so many constructive contributions to the development of inter-

American and also universal international law, here gives us a survey of the basic principles and institutions which have characterized international relations during the past century and a half and which must now be revised to meet the demands of the new era. The individualism of the past must give way to the interdependence of the present. The traditional conception of positive law must be transferred into a law of social interdependence. The state is more than the sum of the individuals who compose it. It is a new organism, at once political, economic, social, psychological, and international in character. A chapter is devoted to the new social and international rôle of the individual, and in this connection the author examines the Declaration of the Rights of Man then under examination by a commission of the United Nations. Perhaps the most significant chapter is that dealing with the crisis of international law and the necessity of its reconstruction to take account of the new régime of interdependence, culminating in a "Declaration of the Great Principles of Modern International Law," along the lines of the project presented by Sr. Alvarez himself to the Hague Conference for the Codification of International Law in 1930.

Here and there the author's generalizations are somewhat too broad and need to be reduced to more concrete terms. Also, it is respectfully suggested that the generalization on page 47, concerning *La démocratie russe*, should be reconsidered. Whether the present régime in Russia is maintained really "for the benefit of the people" will raise doubts in many minds.

C. G. FENWICK

War and Peace Aims of the United Nations. From Casablanca to Tokio Bay, January 1, 1943—September 1, 1945. Compiled and edited by Louise W. Holborn. Introduction by Sidney B. Fay. Boston: World Peace Foundation, 1948. pp. lxvi, 1278. Bibliography. Index. \$6.00. This is the second and final volume of Miss Holborn's compilation of official documents and speeches by national leaders having a bearing on the war and peace aims of the nations united in fighting the Axis Powers. The first volume, covering the period September 1, 1939—December 31, 1942, was published by the World Peace Foundation in 1943. No reader of the present volume can fail to appreciate again the laborious work undertaken by Miss Holborn, nor will he lay the book aside without finding his memory refreshed, his knowledge enlarged, and his thought stimulated.

Not all parts of the volume are of equal value, however. Miss Holborn's selections dealing with the evolving structure of the United Nations (Dumbarton Oaks Proposals, United Nations Charter, Statute of the International Court, Specialized Agencies) are far too brief to be of much help. The space saved by the elimination of some forty pages could have been profitably used to enlarge the sections assigned to the individual American Republics and to the Middle Eastern and African Members of the United Nations.

In her editing of the volume Miss Holborn has not in all respects been consistent, thereby impairing not only the book's symmetry, but at times also its value as an aid and guide to further research. Thus the tables of the chronology of events prefacing the various sections do not cover identical periods (usually they start some time in 1943, but in the case of France in 1942, and in the case of Greece, in 1939). The items under the

various index headings seem at times selected at random (see the heading "San Francisco Conference, speeches by," where no reference is made to the speeches of the Chinese and French delegates, nor to the speeches of the delegates of numerous lesser Powers, even when these speeches are the only source item in the volume from which the nations' stand on war and peace aims can be gleaned).

Despite such criticism, the volume is a very useful and handy source book, containing, as it does, such diverse materials as the reports of the conferences of the Big Powers from Casablanca to Potsdam, the armistice agreements, the Sino-Russian Agreements of 1945, the Canberra Agreement, the Pact establishing the Arab League, the Act of Chapultepec, and significant statements and speeches by national leaders of the United Nations. For those interested in further research the extensive footnotes smooth the way.

In using the book one thing must be born in mind, however, before drawing conclusions as to the war and peace aims of this or that Member of the United Nations. The statements or speeches of those who were critical of the official policy of their nation are not included in the volume, since such men were not the national leaders of the day. Yet, in drawing conclusions as to a nation's war and peace aims, the views of the "opposition" cannot be overlooked.

GEORGE V. WOLFE

Contrôle de l'Allemagne. By Louis F. Aubert, William Diebold, Michael Zvegintzov, et al. Paris: Marcel Rivière et Cie., 1949. Distributed for the Council on Foreign Relations by Columbia University Press, New York. pp. 144. \$1.25. The development of a program of European economic coöperation brought to the fore the "German Question" of extraordinarily difficult, almost exasperating character, created by its many various aspects. Bitter controversies developed over the dismantling of German plants and over the future control of the Ruhr. After World War II the issue of control of Germany was repeatedly raised and numerous proposals and plans were discussed.

In 1946 Louis F. Aubert published his book *Securité de l'Occident: Ruhr-Rhin*. He now writes the introduction to the volume under review by saying that "on all occasions, since the armistice, the allied governments have officially proclaimed that after their direct administration of Germany, they felt obliged to control her afterwards. However, up to the time of the agreements of London (June and December, 1948) they have never said how they would carry out such control."

Representatives of The Royal Institute of International Affairs; *The Centre d'Études de Politique Étrangère*; The Council on Foreign Relations; and The Netherlands Institute for International Affairs, and others, met in The Netherlands, at Baarn (October, 1947) and at Scheveningen (April, 1948) in conference, discussing some aspects of the German problem, and simultaneously attempting to define a program for control.

The introduction (pp. 9-20) briefly analyzes the principal ideas advanced on this vital subject and exposes the themes published in the memoirs as well as the arguments exchanged during the course of the discussions. The five subtitles therein deal with (1) Should Germany be controlled?; (2) Method of a specific control for security; (3) A statistical cordon around the Ruhr; (4) Other forms of control; and (5) Organiza-

tion of the Ruhr. It is followed by a reprint of the French memorandum No. 1, discussed at Baarn in October, 1947, entitled "Contrôle de Sécurité" by Mr. Aubert, in which he treats at length the necessity, the possibility, and the urgency of control (pp. 21-49). This first memorandum was amplified in regard to these three phases by a second one, also by Louis F. Aubert, and was discussed at Scheveningen in April, 1948. It concludes that unilateral control is indispensable during the years of transition from a historic to a new Germany (pp. 51-70).

In his memorandum "Security Control of Germany" (pp. 71-80), Michael Zvegintzov attempts to outline in concise manner a working scheme for a long-term security control. His memorandum is succeeded by a lengthier study by William Diebold, Jr., "A Special Regime for the Ruhr? An Essay in Clarification" (pp. 81-108), which he prepared for the conference at Scheveningen. He furnishes a brief background to the problem and states the French view that the Ruhr should be subjected to international control for two principal purposes: (1) to prevent German aggression and (2) to make use of Ruhr resources for the general benefit of Europe. He then discusses the American position and points out that the Ruhr has not occupied as central a position in American policy as in that of France, but that our policy has recognized the validity of the two broad purposes stated by the French. However, we have been reserved concerning the proper means of achieving them. Subsequently it was agreed at London to create an International Authority for the Ruhr, inducing Mr. Diebold to add a postscript commenting briefly on its relation to some of the main points of his report.

The next memorandum, under the title "The Control of German Economy" (pp. 109-118), summarizes a discussion in which nine members of the Netherlands Society for International Affairs took part and, in an epilogue (pp. 119-144), Mr. Aubert concludes this valuable collective contribution, treating one of the riddles and sore spots of international politics, under the heading: "*Contrôle actuel et contrôle futur de l'Allemagne par la Ruhr.*"

CHARLES KRUSZEWSKI

International Commitments and National Administration. (Ed. by R. Egger.) Charlottesville: University of Virginia, 1949. pp. vi, 108. \$1.50. This small booklet contains the six talks prepared for a round-table of the American Political Science Association on the general topic "The Impact of Foreign Commitments on Administrative Organization." They are published by the Bureau of Public Administration at the University of Virginia, through the interest of Rowland Egger, Director of the Bureau. Professor W. Y. Elliott spoke on "Congressional Control over Foreign Policy Commitments," noting the wide increase of the influence of the House of Representatives. Professor Holcombe commented, with regard to the effect upon the Presidency, upon the vast discretionary power which the President has acquired under such measures as Lend-Lease or aid to Greece, and suggested that the theory of separation of powers should be maintained with regard to foreign policy. George McGhee discussed the multifarious relationships of the Department of State and its responsibility for coördination of these activities. General Otto Nelson talked of foreign commitments as providing a measure of calculation as to the needs for national defense, and Paul Hoffman, of the heavy impact of the Economic

Coöperation Administration on national administration. Finally, Walter Sharp raised various concrete questions as to how the gears of national governmental machinery can be meshed with those of the United Nations and the Specialized Agencies. In all these talks the need for leadership and coöperation was stressed.

CLYDE EAGLETON

The Atlantic Pact. By Halford L. Hoskins. Washington: Public Affairs Press, 1949. pp. 104. Index. \$2.50. This small volume is a study of the Atlantic Pact primarily from the point of view of international politics. Twelve annexes give the corresponding documents, chronology and a selected bibliography. The Pact is seen as a break with American isolationism; the steps leading to it in American foreign policy and in European developments are surveyed; the limits of the defense area, with particular reference to the problem of Sweden, Italy, Portugal, Spain and Germany; the Soviet attitude, the importance of the Pact as an argument for other regional pacts; the content of the Pact; problem areas that may arise, and the implementation of the Pact are studied. Although directed against no one except an aggressor, the Pact—it is admitted—is a peace-time alliance in consequence of the aggressive tactics of the Soviet Union and the partial failure of the United Nations. The positive evaluation of the Pact is based on the belief that the Pact, if adequately implemented, will not only avert the danger of war in the near future, but will even reduce it to an unlikely contingency. But the future of Europe and possibly the hope for peace in our time will depend to a very considerable extent on the future of Germany. Many political problems are stated only as questions. Legal problems are, at the most, only touched.

JOSEF L. KUNZ

The Commonwealth and the Nations. Studies in British Commonwealth Relations. By Nicholas Mansergh. London: Royal Institute of International Affairs, 1948. pp. viii, 230. Index. 8 s. 6 d. The eight essays of this book by Professor Mansergh of the Royal Institute of International Affairs are eight little gems, both as to succinctness and style. The first two deal with the nature of the Commonwealth and with the methods of coöperation among its units. Then follow an essay on "Dominion Conceptions of the Commonwealth" (on the Canadian, Australian, and South African approach, omitting, however, for no obvious reason, that of New Zealand), and three essays related to the Asian scene: "The Asian Conference in 1947," "The Last Days of British Rule in India," and "Britain, Russia and South-East Asia." Finally, there are two essays on Ireland, one exploring the political and social forces in Ireland since the Easter Rebellion, the other the implications of Eire's relationship with the Commonwealth.

Throughout the eight studies one major theme, which reveals itself fully in the last essay, is audible. The Commonwealth of the old Dominions "is a loose association of autonomous states whose members are bound together by certain conventional understandings and united formally by a common allegiance to the Crown and informally . . . by a common outlook and common ideals of freedom." The units of this Commonwealth are more or less wedded to the idea of decentralization of Commonwealth relations

and are averse to any written formulation of Commonwealth coöperation. But when Dominion status was applied to Ireland, it failed, since the background and the training for an understanding of the unwritten conventions underlying such status were lacking. From this a lesson should be drawn regarding the former non-self-governing territories of Asia, the more so since they are not heirs of Western civilization. Commonwealth relations regarding these territories should not be based on Dominion status if they are not to be lost for the Commonwealth, as Burma is already. They should be based instead on "external association," that is, on a lasting but *defined* relationship in the field of "external policy especially, in which is to be included the all important and related fields of foreign affairs and defense." Once established in Asia, such a new pattern of Commonwealth relationship would easily serve as tomorrow's precedent for the Empire's peoples in Africa and in the West Indies seeking independence. As a result of such an evolution a strengthened Commonwealth would emerge "in which there are both member states and associate states, the distinction being one not of status, but of history, tradition, and cultural background."

GEORGE V. WOLFE

Germany under Occupation. Illustrative Materials and Documents. Edited by James K. Pollock, James H. Meisel, and Henry L. Bretton. (Rev. ed.) Ann Arbor, Mich.: Wahr Publishing Co., 1949. pp. 326. Illustrations. Supplements. This collection of documents concerning Germany under occupation is here presented in a second edition in a closely mimeographed form. The material is brought up to May, 1949. Starting with the Yalta agreements, the documents of surrender and assumption of supreme authority and the Potsdam agreements, it gives the proclamations of the Control Council and documents on German reparations and the level of Germany industry. Then emphasis is placed on the documents concerning the American Zone. Documents concerning the other zones are selected; a note on the Saar and a synopsis of the Saar Constitution are given.

Documents concerning Greater Berlin and a note on the Berlin conflict are included. Documents are given in full concerning Bizonia, the London Conference of June 20, 1948, the Ruhr Authority, the Occupation Statute, the adjustment of the West German frontier, and the establishment of the Federal Republic of Germany. The first annex gives the principal political parties in Germany in 1946-1948, while the second contains the text of the so-called Bonn Constitution.

Each section is preceded by an introductory note of the editors, giving a rapid glance at the documents contained in this section. There is, of course, no study of the problems involved. It is merely a collection of materials. But in view of the great importance of the German problem, both theoretically and practically, and the great and often widely scattered mass of documents, this collection, well arranged and comprehensive as it is, is certainly an exceedingly valuable tool for the international lawyer.

JOSEF L. KUNZ

Governments of Danubian Europe. By Andrew Gyorgy. New York: Rinehart & Co., 1949. pp. viii, 376. Appendix. Index. \$4.00. Aiming to tie together the basic trends underlying the history and contemporary

political trends of "Danubian Europe," which, to Gyorgy, means Czechoslovakia, Austria, Hungary, Rumania, Yugoslavia, and Bulgaria, the author bases his thesis on the assumption that "the six countries are inseparably linked by the ever-present ties of geography and economics." It is really unfortunate that Gyorgy has failed to prove this claim. It could be, for instance, seriously debated whether, during the period covered by Gyorgy, Czechoslovakia was "inseparably linked" with Bulgaria. Furthermore, the volume is, throughout, superficial in its generalizations and hurried in its observations and reflections. Gyorgy propounds, for instance, the view that after 1918 "the new countries were devoid of natural defenses" (p. 15); but were not Czechoslovakia's Sudeten Mountains a "natural defense" (as noted by Gyorgy on p. 69)? In the late twenties, claims Gyorgy, "authoritarian tendencies spread rapidly . . ." (p. 31). Did they in Czechoslovakia? "Members of the middle class, usually of the lower nobility . . ."; but what "lower nobility" existed in Czechoslovakia, Yugoslavia, or Bulgaria in recent centuries? Numerous other examples of such faulty statements could be provided. In addition Gyorgy, in spite of his insistence that he has been "as impartial as possible" (p. vii), shows his pro-Hungarian leanings again and again (see, for instance, p. 13) in his generalizations as well as in his selections of bibliography. As a matter of fact Gyorgy's "Representative Bibliography" (pp. 352-365) neglects to note several works covering this area, either aiming to give the impression that his is the pioneering study of the field, or due to his carelessness. (We are referring, to cite some glaring examples, to Emil Lengyel's *The Danube*, published in 1939, or the "Bibliography of Central and Eastern Europe," printed in the March, 1944, issue of *The Annals of The American Academy of Political and Social Science*, pp. 176-181.) All in all, the study might be interesting reading for the non-specialist; for the specialist it is an indication of investigation that needs to be done rather than a survey of what has been already successfully accomplished.

JOSEPH S. ROUCEK

A Short History of the Middle East. By George E. Kirk. Washington: Public Affairs Press, 1947. pp. viii, 302. Maps. Index. \$3.75. Students of Near Eastern affairs have for long keenly felt the need for the publication of a concise and authoritative book which would provide a general background for current Near Eastern problems. Professor Carl Brockelmann's *History of the Islamic Peoples* (New York: Putnam, 1947), though it covers the history of the Near East from the rise of Islam to the present time, emphasizes the early Islamic beginnings rather than the modern period and thus could hardly provide for the reader an adequate background for current affairs. Mr. George Kirk has definitely written his volume with a view to satisfying the need of the student of current affairs. His *Short History of the Middle East*, though it covers the same period as Brockelmann's work, devotes the main part of the book to the modern period.

Mr. George Kirk wrote his work after a thorough examination of the sources (though his bibliography at the end of the book is highly selective) and has obtained information from a number of persons who lived in the Near East. He is well acquainted with Egyptian and Arab problems and his interpretation of the main interests and policies of the Great Powers in the Near East is sound; but his discussion of Turkish problems is very

sketchy and no attention is paid to the North African dependencies and only casual references are made to Afghanistan. His account of the Crimean War is so brief (hardly half a page, pp. 77-8) that it gives a vague picture of the events and their significance. No mention is made of the effect of the war on the closure of the Straits—a problem which has occupied Russia ever since. The surveys of Sir William Willcocks regarding irrigation in Iraq might have been referred to on page 234. The plan of the work, perhaps, has necessitated such omissions. While the origins of the Turkish Capitulations are casually mentioned on page 65 (the date of origin is generally accepted as 1535 rather than 1536), their abolition in 1923 by the Treaty of Lausanne was overlooked. The statement that "complete independence is never given; it is always taken," ascribed to General Jafar al-Askari (as Gertrude Bell wrongly reported in her *Letters*), was first made by Amir Faysol (later King of Iraq) in a speech which he made in Beirut on April 30, 1919. In spite of these minor errors and omissions, Mr. Kirk is to be congratulated for his accuracy, lucid style, and soundness of interpretations.

MAJID KHADDURI

American Arbitration. Its History, Functions and Achievements. By Frances Kellor. New York: Harper and Bros., 1948. pp. xiv, 264. Index. \$3.00. The volume under review is devoted primarily, as its title suggests, to a consideration of the development of the processes of commercial arbitration within the United States. Substantial sections are devoted to various phases of labor, industrial, and business disputes. Only incidental attention is devoted to arbitration between nations. The present generation has learned, however, that there is no sharp line of demarcation between international and domestic affairs, and that techniques, practices, and predilections applicable in international relations must often be developed in the laboratory of domestic situations. The author concurs in this sentiment by urging that "until people of their own accord, and through their own efforts, learn to arbitrate their differences within the range of their own activities and experiences, governments will not be much inclined amicably to solve their differences" (p. 22).

There is much material on the criteria for selecting arbitrators, the rules of procedure, and the general spirit which must pervade the undertaking before arbitration can be successful. Much of this could profitably be transferred to the international sphere. The penultimate section of the work is devoted to a consideration of American experiences in international commercial arbitration, with particular reference to the Western Hemisphere. This portion of the monograph, because of its close connection with intergovernmental arbitration, will especially merit the attention of the student of international affairs.

ROSCOE OGLESBY

Prontuario de Derecho Consular Chileno. By Jonás Guerra Araya. Santiago: Imprenta Chile, 1948. pp. 234. Indexes. This compendium, presented as a dissertation in connection with a degree of *Licenciado en la Facultad de Ciencias Jurídicas y Sociales* in the University of Chile, while serving principally for the use of persons in the consular service of Chile, nevertheless contains a number of chapters which throw light upon the general and special functions of consuls and upon their rights and obliga-

tions in international law. In the course of a detailed enumeration and analysis of the installation, organization, and functions of consuls under the law of Chile, the volume discusses briefly the position of consuls in matters of civil and penal law, the distinction between official and non-official acts, asylum in consulates, and exemption from taxation. The wide range of functions assigned to Chilean consuls explains the quotation from Talleyrand: "After having been a skilful diplomat, how many things one must know to be a good consul."

C. G. FENWICK

Law Dictionary. English-Español-Français-Deutsch. By Lawrence Deems Egbert. New York: Fallon Publications, 1949. pp. xviii, 637. There has long been need of a dictionary of legal terms and phrases in the four languages of this volume, not to mention others; and the present volume goes part of the way, if not the whole way, towards filling the need. It is particularly commendable for its generous listing of words, phrases, and special idioms under a leading word or term, as well as for the inclusion of many words not strictly legal in character but on the borderline, the benefit of doubt being in favor of general use. The Spanish section suffers, in comparison with the German and French sections, by a less generous listing of synonyms and synonymous phrases, although, taking into account the fact that in the eighteen Spanish-speaking countries of Latin America there are frequently different words for the same legal concept, there should have been a far greater number of synonyms than for the other three languages. A person using the dictionary in connection with a specific country might find a number of omissions or might use a word or phrase not commonly used in the particular country.

A small number of typographical errors have crept in, but these may readily be overlooked. Doubtless *primera violencia* as the equivalent of "first offense" is a slip for *primera violación*.

T. M. GANNETT

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* Mention here neither assures nor precludes later review.

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**RESTITUTION OF IDENTIFIABLE PROPERTY TO
VICTIMS OF NAZI OPPRESSION ¹**

ALLIED KOMMANDATURA BERLIN ORDER

BK/O (49) 26, February 16, 1949

Subject: Restitution of Property to Victims of Nazi Oppression: Filing of Claims.

To: The Oberbuergermeister, City of Berlin.

The Allied Kommandatura Berlin orders as follows:

1. In order that due restitution may be made to those persons detailed in paragraph 2 of this order who were dispossessed of their properties, the following order is issued as preliminary to such restitution.

2. This order relates to all identifiable property in Berlin which was, between January 30, 1933, and May 8, 1945, confiscated, sold or removed from the ownership, possession or custody of any person by reason of his race, nationality, religion or political opinions, regardless of whether such confiscation, sale, removal and/or other form of dispossession was due to or authorized by legislation or procedure which purported to follow forms of law, or otherwise.

3. This order does not relate to any property having at the date of transfer a total value of less than RM 1000 (Reichsmark).

4. Any person who has or at any time since January 30, 1933, has had possession, custody or control of any property to which this order relates shall, within six months from the date of this order, make a report in duplicate in respect of such property to the Treuhaender der Amerikanischen, Britischen und Franzoesischen Militaerregierungen fuer zwangsuebertragene Vermoegen, Berlin W 30, Nuernbergerstrasse 53/55. This report will be on the form as attached hereto at Appendix "A."²

5. Any person who has knowledge of any specific transfer since January 30, 1933, of property subject to this order shall within six months from the date of this order make a declaration in duplicate to the Treuhaender der Amerikanischen, Britischen und Franzoesischen Militaerregierungen fuer zwangsuebertragene Vermoegen, Berlin W 30, Nuernbergstrasse 53/55. This declaration will be on the form as attached hereto at Appendix "B."²

6. Property shall be so declared even if it has been requisitioned or de-

¹ Federal Register, Sept. 1, 1949, pp. 5437-5445. Reprinted by the Department of State.

² Not printed here.

clared for any purpose under any order of the respective Military Governments.

7. Any person deprived of property which is subject to this order may file a claim for its restitution. Claims may be made in duplicate on the form as attached hereto at Appendix "C"² and will be submitted to the Treuhaender der Amerikanischen, Britischen und Franzoesischen Militaerregierungen fuer zwangsuebertragene Vermoeegen, Berlin W 30, Nuernbergerstrasse 53/55.

8. An adequate supply of all the forms referred to in the appendices to this order will be provided by the Treuhaender der Amerikanischen, Britischen und Franzoesischen Militaerregierungen fuer zwangsuebertragene Vermoeegen, Berlin W 30, Nuernbergerstrasse 53/55.

9. All property to which this order relates is hereby declared to have been and to be subject to all the provisions of British, US and French Law No. 52.

10. Any person required by paragraphs 4 and 5 of this order to make a declaration who fails to do so, or omits any material fact or particular from such a declaration, or makes any false or misleading statement therein, is liable to prosecution for disobedience of an order of Military Government.

11. You will give the widest publicity to this order by means of press, radio and posters.

12. This order is effective from the date of publication.

13. Acknowledge receipt of this order, citing number and date.

By order of the Allied Kommandatura Berlin.

ALLIED KOMMANDATURA BERLIN ORDER

BK/O (49) 180, July 26, 1949

Subject: Restitution of Identifiable Property to Victims of Nazi Oppression.
To: The Oberbuergermeister of the City of Berlin.

In order to provide for the restitution of property to those persons who between January 30, 1933, and May 8, 1945, were deprived thereof by reason of their race, creed, nationality or political belief and in pursuance of BK/O (49) 26, dated February 16, 1949;³

The Allied Kommandatura Berlin orders as follows:

PART I—GENERAL PROVISIONS

ARTICLE 1—BASIC PRINCIPLES

1. The purpose of this order is to effect to the highest extent possible the speedy restitution of identifiable property (tangible and intangible) to persons who were unjustly deprived of such property between January

² Not printed here.

³ See above, p. 39.

30, 1933, and May 8, 1945 (hereinafter called the "material period"), for reasons of race, religion, nationality, political views or political opposition to National Socialism. Subject to the provisions of paragraph 5 of Article 2 of this order, deprivation of property for reasons of nationality shall not include measures which were taken in time of war solely on the ground of enemy nationality.

2. Identifiable property of which a person was unjustly deprived for any of the reasons referred to in paragraph 1 may be made the subject of a claim for restitution in accordance with the provisions of this order.

3. Property shall be restored to its former owner or to his successor in interest in accordance with the provisions of this order, even though the interests of other persons who had no knowledge of the wrongful taking must be subordinated. Provisions of law for the protection of purchasers in good faith, which would defeat restitution, shall be disregarded except where this order provides otherwise.

4. For the purpose of this order the person entitled to claim restitution of identifiable property is hereinafter referred to as the "claimant"; the person against whom such claim is made is hereinafter referred to as the "defendant," and property which is capable of being the subject of a claim for restitution is hereinafter called the "affected property."

5. This order does not relate to any property having at the date of transfer a total value of less than RM 1,000.

PART II—UNJUST DEPRIVATION

ARTICLE 2—ACTS CONSTITUTING UNJUST DEPRIVATION

1. For the purpose of this order property shall be considered as having been the subject of unjust deprivation if the person entitled thereto was within the material period deprived of the ownership or possession thereof or any present or contingent rights thereover as the result of:

(a) A transaction contra bonos mores or induced by threats or duress or involving an unlawful dispossession or any other tort:

(b) A seizure by governmental or administrative act or by the abuse of governmental or administrative authority; or

(c) A seizure by measures taken by the NSDAP, its formations or affiliated organizations; provided that the transaction, seizure or act in question constituted or resulted from a measure of persecution for any of the reasons referred to in Article 1.

2. A defendant may not plead that any act of his was not wrongful merely because it conformed with prevailing ideas involving discrimination against persons on account of their race, religion, nationality, political views or their political opposition to National Socialism.

3. A governmental or administrative act within the meaning of paragraph 1 (b) shall be deemed to include a sequestration, confiscation, forfeiture by operation of law or by a court or other order and a transfer by order of the State or any of its officials (including a trustee (Treuhaender)).

4. A judgment or order of a court or of an administrative agency which although based on general provisions of law duly applicable was issued solely or primarily with the object of injuring the party affected by it for any of the reasons referred to in Article 1 shall be deemed to be an abuse of a governmental act. The procurement of a judgment or of measures of execution shall also be deemed to be an abuse of a governmental act where the circumstances were such that the claimant was exploited in that he was prevented from protecting his interests on account of his race, religion, nationality, political views or his political opposition to National Socialism. The Restitution Authorities (Restitution Agency, Restitution Chamber, the Kammergericht and Board of Review) shall disregard any such judgment or order of a court or administrative agency whether or not such judgment or order may be the subject of an appeal or a re-opening procedure.

5. Where property has been placed under administration on the ground of enemy character and the administrator, curator or other custodian has transferred the title to the property under administration, such transfer shall be deemed to be an unjust deprivation unless such transfer constituted a proper exercise of the functions of the administrator, curator or custodian.

ARTICLE 3—PRESUMPTION OF UNJUST DEPRIVATION

1. The following transactions within the material period shall give rise to a presumption in favour of a claimant that they constituted an unjust deprivation within the meaning of Article 2:

(a) Any transfer or relinquishment of property made by a person who was directly exposed to measures of persecution on any of the grounds referred to in Article 1:

(b) Any transfer or relinquishment of property made by a person who belonged to a class of persons which the German government or the NSDAP intended on any of the grounds referred to in Article 1 to eliminate in its entirety from the cultural and economic life of Germany by measures taken by the State or the NSDAP.

2. In the absence of other factors proving or leading to the inference of an act of unjust deprivation within the meaning of Article 2 the presumption arising under the preceding paragraph may in the case of a transfer within paragraph 1 (a) be rebutted by showing that the transferor was paid a fair purchase price, that is to say, an amount of money

which a willing buyer would pay and a willing seller would take, including in the case of a commercial enterprise the goodwill which such enterprise would have in the hands of a person not subject to the measures of persecution referred to in Article 1, and in any case that the transferor had a free right of disposal of the said purchase price.

3. In the case of a transfer within paragraph 1 (b) of this Article, where such transfer took place between September 15, 1935, and May 8, 1945, the presumption arising under such paragraph may only be rebutted by evidence satisfactory to the Restitution Chamber (Article 57) and additional to the requirements of the preceding paragraph that:

(a) The transaction in the light of its essential terms would have taken place even in the absence of a National Socialism régime; or

(b) The transferee protected the proprietary interests of the claimant or his predecessor in title in an exceptional manner and with substantial success for example by helping him to transfer his assets abroad.

ARTICLE 4—GIFTS

Where a person persecuted for any of the reasons referred to in Article 1 transferred a property to another gratuitously within the material period, it shall be presumed in favor of the claimant that the transfer gave rise to a fiduciary relationship and was not a gift. No such presumption shall arise, where, from the personal relationship between the transferor and the transferee it can be shown that the transfer was a gift based on moral considerations (*Anstandsschenkung*) in which case no claim for restitution may be made.

ARTICLE 5—FIDUCIARY RELATIONSHIPS

1. The provisions of Parts III to VII of this order shall not apply to agreements giving rise to a fiduciary relationship entered into for the purpose of preventing threatened damage to property or mitigating actual damage thereto arising from any of the reasons referred to in Article 1.

2. The claimant may at any time, by notice, terminate any agreement of the kind specified in the preceding paragraph. Termination shall be effective immediately on service of the said notice, any contractual or statutory provision to the contrary notwithstanding.

3. A person in a fiduciary relationship may not plead that the agreement giving rise to a relationship was made in breach of a statutory prohibition in force at or subsequent to the time of the transaction or that a statutory or other requirement as to form had not been complied with, where such non-compliance was attributable to any act or measure of the National Socialism régime or to conditions prevailing under such régime.

PART III—GENERAL PROVISIONS ON RESTITUTION

ARTICLE 6—RIGHT TO LODGE CLAIMS

Subject to the provisions of Article 9, the right to lodge a claim for restitution shall belong to any person whose property was the subject of unjust deprivation or any successor in interest.

ARTICLE 7—SUCCESSORSHIP OF DISSOLVED ASSOCIATIONS

1. If a juridical person or unincorporated association was dissolved or forced to dissolve for any of the reasons set forth in Article 1, the claim for restitution which would have appertained to such juridical person and unincorporated association had it not been dissolved may be enforced by a trust corporation to be appointed by Military Government. Either trust corporations or successor organizations, formed in Berlin under German law, or authorized to operate in the respective Zones, shall be eligible to apply for such status in the respective Sectors of Berlin. Such organizations or corporations are hereinafter referred to as the "trust corporation."

2. The provisions of paragraph 1 shall not be applicable to organizations referred to in Article 8.

ARTICLE 8—RIGHTS OF INDIVIDUAL PARTNERS

If a partnership, company or corporation organized under the Commercial Law was dissolved or forced to dissolve for any of the reasons set forth in Article 1, the claims for restitution may be asserted by any associate (partner, member, or shareholder). The claim for restitution shall be deemed to have been filed on behalf of all associates who have the same cause of action. The claim may be withdrawn or compromised only with the approval of the appropriate Restitution Authority. Notice of the filing of the claim shall be given to all other known associates or their successors in interest and to a trust corporation competent according to Article 9. Within the limits of its authority the trust corporation may represent in the proceedings any associate whose address is unknown, in accordance with the provisions of Article 10.

ARTICLE 9—TRUST CORPORATION IN RESPECT OF HEIRLESS AND UNCLAIMED PROPERTY

1. One or more trust corporations as referred to in Article 7 shall be appointed for the purpose of claiming unclaimed and heirless property.

2. Trust corporations shall claim any affected property:

(a) Where no claim for restitution has been lodged; or

(b) Where the victim of Nazi persecution has died or dies intestate without leaving a spouse or heir entitled to his inheritance.

3. Regulations to be made by the Military Governments of the respective Sectors will provide for the appointment of trust corporations and will define their rights and obligations and specify the classes of persons to whose property they may respectively lay claim.

ARTICLE 10—SPECIAL RIGHTS OF TRUST CORPORATIONS

1. If within six months of the effective date of this order no petition for restitution has been filed with respect to an affected property, a trust corporation established pursuant to Articles 7 and 9 may file a petition and apply for all measures necessary to safeguard the property.

2. If the victim or his successor does not himself file a petition on or before June 30, 1950, a trust corporation shall by virtue of filing the petition succeed to the legal position and rights of the victim.

3. The provisions of paragraphs 1 and 2 hereof shall not apply to the extent to which any victim or his successor in interest in the period from May 8, 1945, to June 30, 1950, has delivered to the defendant, to the appropriate Restitution Authority, or to the Treuhaender der Amerikanischen, Britischen und Franzoesischen Militaerregierungen fuer zwangsuebertragene Vermoeen, Berlin W 30, Nuernbergerstrasse 53/55 (hereinafter referred to as "the Treuhaender"), an express waiver in writing of his claim for restitution.

ARTICLE 11—OBLIGATION OF SUCCESSORS IN INTEREST TO GIVE INFORMATION

1. If so ordered by the appropriate Restitution Authority, a claimant whose claim for restitution is derived as an immediate or mediate successor in interest to the person who suffered an unjust deprivation of his property, shall disclose to the Authority the name and last known address of his predecessor in interest, or where any of these particulars are known to him, make a sworn declaration to that effect.

2. A trust corporation shall in respect of any claim which it may make under this order, if called upon, disclose the address of any person interested therein, provided such address is known to it, or such information known to it as may lead to the tracing of such person, or where none of these particulars are known, if so required make a sworn declaration to that effect through its legal representative.

ARTICLE 12—PERSONS LIABLE TO MAKE RESTITUTION

The person liable to make restitution within the meaning of this order shall be the person who, on the effective date of this order, or on the making of any order for restitution, has the right of disposition of the property, or in an action for possession of property, the possessor.

ARTICLE 13—EFFECT OF AN ADJUDICATION OF A RESTITUTION CLAIM

Unless otherwise provided in this order, an order for restitution shall have the effect that the title, of the claimant or his predecessor in title, to any property the subject of an unjust deprivation shall be deemed not to have been divested.

ARTICLE 14—ALTERNATIVE CLAIM FOR ADDITIONAL PAYMENT

1. If he relinquishes all other claims under this order the claimant may demand from the person who first acquired the affected property the difference between the price received by the claimant therefor and the fair purchase price at the time of the transaction as defined in Article 3, paragraph 2. Appropriate interest shall be added to this amount in accordance with the provisions relating to profits contained in this order.

2. A demand under the preceding paragraph shall not be permissible:

- (a) After the property has been restored to the claimant by an order no longer subject to appeal;
- (b) After the Restitution Chamber has given a decision on the merits; or
- (c) After the claimant and the defendant have reached an amicable agreement with regard to the restitution claim.

PART IV—LIMITATIONS ON THE RIGHT TO RESTITUTION

ARTICLE 15—EXPROPRIATION

1. Affected property which, subsequent to the privation, was expropriated for a public purpose, or was sold or assigned to an enterprise for the purpose of which the right of expropriation could be exercised, shall not be subject to restitution if, on the effective date of this order, the property remains in use for a public purpose still recognized as lawful.

2. If property is not subject to restitution by reason of the provisions of paragraph 1 the present owner shall compensate the claimant to the extent to which the claims open to the claimant under Part V of this order do not afford adequate compensation.

ARTICLE 16—PROTECTION OF ORDINARY AND USUAL BUSINESS TRANSACTIONS

Except as provided in Articles 17 and 18, movable property shall not be subject to restitution if the present owner, or his predecessor in interest, acquired it in the course of an ordinary business transaction, in an establishment normally dealing in that type of property. The provisions of this Article shall not, however, apply to articles having a religious association, or to property which was acquired from a private owner, if such property is an object of unusual artistic, scientific, or personal value, or was acquired at an auction or private sale in an establishment engaged mainly in the business of disposing of property the subject of an unjust deprivation.

ARTICLE 17—CURRENCY

Currency, so far as identifiable, shall be subject to restitution only if at the time he acquired the money the defendant knew or should have known in the circumstances that the person entitled thereto had been unjustly deprived thereof.

ARTICLE 18—BEARER INSTRUMENTS

1. If a bearer instrument was acquired in the course of an ordinary business transaction, good faith (*gutgläubiger Erwerb*) shall be presumed unless the transaction falls within the provisions of paragraph 3 of this Article.

2. The provisions of paragraph 1 shall also apply to interests in bearer instruments deposited in a central account (*Sammelverwahrung*).

3. Bearer instruments and interests in bearer instruments shall, nevertheless, be subject to restitution under this order if at the time of the unjust deprivation they represented:

(a) A participation in a business with a small number of members, such as a family corporation;

(b) A participation in a business the shares of which had not been negotiated in the open market;

(c) A dominant participation in a business as to which it was known, generally or in the trade, that a dominant participation was held by persons who belonged to one of the classes described in Article 3, paragraph 1 (b); or

(d) A dominant participation in a business establishment which was registered under the Third Ordinance to the Reich Citizen Law (*Reichsbürgergesetz*) of June 14, 1948 (RGBl, I, p. 627).

4. A participation shall be deemed to be dominant if, either standing alone, or on the basis of a mutual working agreement in existence prior to or at the time of the unjust deprivation, it permitted the exercise of controlling influence upon the management of the business or enterprise.

ARTICLE 19—RESTITUTION WHERE CHANGES IN THE LEGAL OR FINANCIAL STRUCTURES OF AN ENTERPRISE HAVE OCCURRED

If within the material period a participation of the type described in Article 18, paragraph 3, was the subject of unjust deprivation and the enterprise was dissolved, merged into, consolidated with or transformed into another enterprise, or was changed in any other way in its legal or financial structure, or if its assets were transferred wholly or in part to another enterprise, the claimant may demand that he be given an appropriate share in the transformed or newly formed enterprise, or in the enterprise which acquired wholly or in part the assets of the original enterprise, thereby restoring as far as possible his original participation and the rights incidental thereto.

ARTICLE 20—ENFORCEMENT OF THE PRINCIPLES OF ARTICLE 19

The Restitution Chamber in taking the measures necessary and appropriate to give effect to the rights granted to the claimant under Article 19, may order the cancellation, new issue or exchange of shares, participation certificates, interim certificates, and other instruments evidencing a participation; the establishment of a partnership relationship between the claimant and the transformed enterprise referred to in Article 19, and order the performance of any act required by law to give effect to such rights. Such measures shall be taken primarily at the expense of the persons liable to make restitution in accordance with the provisions of this order. If such measures would affect any other shareholders, they shall be ordered so far as they are concerned only to the extent to which such other shareholders benefited, directly or indirectly, from the unjust deprivation in connection with the state of affairs referred to in Article 19; or if the enterprise itself would be liable to make restitution or to pay damages under this order or under the relevant provisions of the Civil Code, including the principle of *respondent superior*.

ARTICLE 21—OTHER ENTERPRISES

The provisions of Articles 19 and 20 shall apply *mutatis mutandis* where the object of unjust deprivation was a business owned by an individual, a participation in a partnership or a limited partnership; a personal participation in a limited partnership corporation (*Kommanditgesellschaft auf Aktien*), a share in an association with limited liability (*Gesellschaft mit beschränkter Haftung*) or in a Co-operative Society; or a share of a similar legal nature.

ARTICLE 22—SERVICE

When pursuant to Articles 19 to 21 it is necessary to effect service on any person whose identity or present address is unknown, service shall be effected by publication in accordance with the provisions of paragraph 2 of Article 55.

ARTICLE 23—DELIVERY OF A SUBSTITUTE IN LIEU OF RESTITUTION

1. Where subsequently to the unjust deprivation the affected property has undergone fundamental changes which have substantially enhanced its value, the Restitution Chamber may order the delivery of an adequate substitute in lieu of restitution. In determining the adequacy of the substitute the Restitution Chamber shall consider the value of the property at the time of the unjust deprivation and the rights and interests of the parties. The claimant may, however, demand the allocation of an appropriate share in the property unless the defendant offers a substitute of similar nature and of like value.

2. Where the defendant has combined the affected property with other property in such a way as to make it an essential part thereof he may where severance is possible sever the latter property and retain it. In such case he shall at his own expense restore the affected property to its former condition. Where the claimant has obtained possession of the combined property he shall be obliged to permit the severance; he may, however, withhold his consent unless security is given to him to indemnify him against any damage which may result from the severance.

3. In determining whether property has been enhanced in value within the meaning of paragraph 1, only that enhancement in value for which the defendant may claim compensation under the provisions of this order shall be taken into account.

ARTICLE 24—RESTITUTION OF AN AGGREGATE OF PROPERTIES

A claimant may not restrict his demand for restitution to separate items out of an aggregate of properties if the aggregate can be returned as a whole and if the limitation of the restitution to separate items would unfairly prejudice the defendant or the creditors.

ARTICLE 25—PROTECTION OF DEBTORS

A debtor who is liable to satisfy a claim (*Forderung*) which has been the subject of unjust deprivation may at any time before notice to him of the filing of a petition for restitution discharge his debt or obligation by payment to the defendant. The same rule shall apply in favor of a debtor who, prior to the entry in the Land Register (*Grundbuch*) of an objection to its correctness, or of a notice concerning restitution proceedings, makes a payment to a defendant entered in the Land Register as the person to whom a payment is due.

PART V—COMPENSATION AND ANCILLARY CLAIMS

ARTICLE 26—SUBROGATION

1. Upon request of the claimant, a former holder of affected property who would be liable to restitution if he were still holding it, shall surrender any pecuniary compensation or assign any claim thereto which he acquired during the period of his ownership. Whatever the claimant received from one of several defendants shall be set off against the claims he has against the remaining defendants, in connection with the event preventing the return of such property.

2. The same rule shall apply with respect to any compensation or any claim for compensation which the holder or former holder of affected property acquired in respect of any loss, damage, or deterioration of such property.

3. Where actual restitution is impossible, owing to loss or impossibility of establishing present identity, former holders of the property shall be liable in damages under the general rules governing tort liability. In such cases paragraph 2 of Article 27 shall apply.

4. In case of the unjust deprivation of a business enterprise the claim for restitution shall extend to assets acquired after the unjust deprivation unless the defendant shows that such assets were not paid for with funds of the enterprise. If the assets were acquired out of the funds of the enterprise, the resulting increase in the value of the business shall be deemed to constitute profits within the meaning of Article 28. This rule shall also apply to any other aggregate of property. If the purchase was not made with funds of the enterprise the defendant shall have the right of severance, conferred by Article 23, paragraph 2, provided, nevertheless, that the claimant shall have the right to take over the property if the operation of the enterprise would otherwise be seriously hampered.

ARTICLE 27—CONDITIONS OF RESTITUTION

1. The defendant may claim compensation neither for any increase in value of the affected property since the date of the original transfer, nor in respect of any capital expenditure by him, save in the latter case to the extent to which the value of the property is still enhanced by such expenditure at the date of restitution.

2. If the affected property has been lost or damaged or has deteriorated the defendant shall be liable in damages unless he can show that the loss, damage or deterioration was not due to his default. Nothing in this paragraph shall affect the claimant's rights under Article 26, paragraph 2.

ARTICLE 28—PROFITS

1. A claimant shall be entitled to claim the net profits which since the date of the original transfer have been derived from the affected property by the defendant or any predecessor in title, or which ought to have been derived if the defendant or his predecessor in title as the case may be had managed the property as a prudent owner. For the purpose of calculating net profits there shall be taken into account amounts paid by the defendant or his predecessor in title in respect of the ordinary maintenance of the affected property, usual outgoings, interest on money borrowed to provide any purchase money and a reasonable sum for management.

2. Military Government may in regulations to be issued pursuant to Article 80 of this order more specifically define the rights and obligations under paragraph 1 of this Article either generally or in respect of special classes of case.

ARTICLE 29—OBLIGATION TO FURNISH PARTICULARS

The parties shall be obliged to furnish to each other such particulars as are material to any claims under this order. Sections 259 to 261 of the Civil Code shall apply *mutatis mutandis*.

PART VI—CONTINUED EXISTENCE OF INTERESTS
AND LIABILITY FOR DEBTS

ARTICLE 30—CONTINUED EXISTENCE OF INTERESTS

1. Any rights over or interests in the affected property, of third parties, shall continue to be effective to the extent to which they existed prior to the act constituting the unjust deprivation, and to the extent that they have not subsequently been extinguished or discharged. The same rule shall apply to any right or interest subsequently created to the extent to which the aggregate amount of all principal and ancillary claims does not exceed the aggregate amount of all such claims as they existed prior to the act constituting the unjust deprivation. Such rights and interests are hereinafter referred to as "the limit of encumbrances." A right or interest which does not involve payment of money shall continue to be effective only where an interest of the same kind already existed prior to the unjust deprivation and the interest subsequently created is not more burdensome than that existing at the time of the unjust deprivation or where such interest would have come into existence even though the property had not been the subject of an unjust deprivation.

2. The limit of encumbrances may be increased by the amount of any encumbrance created for the purpose of capital expenditure enhancing the value of the property. Any other interest of a third person which exceeds the limit of encumbrances and which arises out of expenditure for which the defendant cannot claim compensation pursuant to Article 27 shall be extinguished except to the extent to which at the time of the restitution the value of the property remains correspondingly enhanced as a result of the expenditure.

3. Rights in or interests over the affected property which, in connection with the unjust deprivation, were created in favor of the claimant or his predecessor in interest shall continue to be effective irrespective of the limit of encumbrances and without prejudice to any claim of the claimant for the restitution of such interests where they were themselves the subject of an unjust deprivation.

4. Interests resulting from the commutation of the Home-Rent Tax (Hauszinssteuer), other than those in respect of overdue payments, shall continue to be effective irrespective of the limit of encumbrances.

ARTICLE 31—DEVOLUTION OF ENCUMBRANCES

If property in land (Grundstueck) has been encumbered by any transaction, act of law or any governmental act constituting an unjust deprivation within the meaning of this order, the right under such encumbrance shall devolve upon the claimant and shall not be considered in computing the limit of encumbrances.

ARTICLE 32—PERSONAL LIABILITY

If, prior to the unjust deprivation of property in land the claimant or his predecessor in title was personally liable in respect of any debt which was secured by mortgage, land charge (Grundschuld) or annuity charge (Rentenschuld) on such property, he shall assume personal liability at the time of restitution to the extent to which the mortgage, land charge or annuity charge continues to be effective under the preceding provisions. The same shall apply in case of obligations in regard to which the defendant may demand to be released pursuant to Section 257 of the Civil Code. The same shall apply also in the case of liabilities which continue to be effective in accordance with Article 30, paragraph 1, second sentence, and replace charges for which the claimant or his predecessor in interest had been personally liable.

ARTICLE 33—DEMAND FOR ASSIGNMENT

1. The claimant may demand the assignment to him, without compensation, of any mortgage, land charge or annuity charge against property in land subject to restitution which is held by any holder or former holder of such property who at any time obtained the property by way of an unjust deprivation. This shall not apply to the personal debt on which the mortgage is based. Any interest created prior to the unjust deprivation shall be subject to the provisions of Article 39, paragraph 3, applied *mutatis mutandis*.

2. The provisions of this Article shall not apply to encumbrances which are to be registered in accordance with the provisions of this order.

ARTICLE 34—LIABILITY FOR DEBTS OF A BUSINESS ENTERPRISE

1. If the claimant recovers a business enterprise or any other aggregate of properties, creditors may in respect of debts to them incurred in the operation of the enterprise or obligations with which the aggregate of properties has been encumbered also assert such claims arising thereout against the claimant insofar as they are in existence at the time of the restitution.

2. In such case the liability of the claimant shall be limited to the property restored and to any other claims to which he is entitled under this order. The claimant's right to limit his liability shall be governed by Sections 1990 and 1991 of the Civil Code.

3. The claimant shall not be liable under paragraphs 1 and 2 to the extent to which the total amount of liabilities exceeds the limit of encumbrances to be computed by applying *mutatis mutandis* the provisions of Article 30 and insofar as the excess of liabilities is not covered by a surplus of assets resulting from the application of Article 26, paragraph 4. In such case the Restitution Chamber shall, in its discretion, take the requisite measures by applying *mutatis mutandis* the provisions of Article 30.

ARTICLE 35—LEASES AND TENANCIES

1. If a defendant or any former possessor has leased land to a third person, the claimant may terminate the lease by giving the notice required by law to the person entitled to possession under the lease. Such notice may not be given until the Restitution Authority has determined that the property is subject to restitution and such determination is no longer subject to appeal, or until the obligation to restore the property has been acknowledged in any other way. The notice must be given within three months of the happening of the said events, whichever shall first happen.

2. The provisions of the Law for the Protection of Tenants (*Mieterschutzgesetz*) in the version of December 15, 1942 (RGB1, I, page 712), shall not apply to any defendant or his predecessor in title who obtained the affected property by way of an unjust deprivation or who, at the time he acquired the property, knew, or should have known in the circumstances, that the property had at any time been obtained by way of an unjust deprivation. The provisions of the said Law shall also not apply where the claimant requires the premises as a suitable dwelling for himself or his near relatives (*nahe Angehörige*). The said Law shall likewise not apply if a dwelling which at the time of the unjust deprivation or of the filing of the petition for restitution was used in connection with the operation of a business enterprise subject to restitution, is required for the continued operation of such enterprise. The provisions of the said Law shall not apply to premises used for commercial purposes if the claimant has a legitimate interest in the immediate return of such premises.

3. Leases entered into by or with the approval of Military Government may be cancelled only with the consent of Military Government.

ARTICLE 36—EMPLOYMENT CONTRACTS

Notwithstanding any contractual provision to the contrary, and without prejudice to the right of the claimant to terminate an employment contract for just cause without notice, the claimant may, by giving notice as provided in a collective labor agreement or in the absence thereof within the statutory period, terminate any existing employment contract made since the unjust deprivation by the defendant or any former holder of a business enterprise subject to restitution. A notice may not be given until the

Restitution Authorities have determined that the enterprise is to be restored and such determination is no longer subject to appeal, or until the obligation to restore it has been acknowledged in some other way. The notice must be given within three months of the happening of the said events, whichever shall first happen.

PART VII—CLAIMS OF THE DEFENDANT FOR REPAYMENT AND INDEMNITY

ARTICLE 37—OBLIGATION TO REPAY

1. In exchange for the restitution of the affected property the claimant shall, subject to the provisions of paragraph 3, repay to the defendant and where appropriate, in kind, any consideration received by him. The amount shall be increased by the amount of any encumbrance against the affected property existing at the time of the unjust deprivation and discharged thereafter, unless such encumbrance has been replaced by another encumbrance which continues to be effective, and unless the discharged encumbrance was created as the result of an act of unjust deprivation within the meaning of this order.

2. Where several items of affected property were the subject of a total consideration, but restitution takes place in regard to only some of these items, the total consideration shall be reduced in the proportion which at the time of the unjust deprivation the item restored bore to the entirety of the affected property.

3. If, at the time of the unjust deprivation, the claimant, for any of the reasons referred to in Article 1, did not obtain, wholly or in part, the power freely to dispose of the consideration received, the repayment shall be diminished by a like amount. The claimant shall surrender to the defendant any claim for indemnity to which he may be entitled in the circumstances.

4. The claimant shall not in any case be required to repay any amount exceeding the value of the affected property at the time of restitution, less the amount of any encumbrance remaining against the property.

ARTICLE 38—LIEN

The defendant shall have no lien (*Zurueckbehaltungsrecht*) in respect of his claims where such lien would substantially delay the speedy restitution of the affected property. The same shall apply to any execution against or attachment of the affected property founded on any counterclaim.

ARTICLE 39—JUDICIAL DETERMINATION OF TERMS OF PAYMENT

1. The Restitution Authorities shall lay down the terms and conditions of payments to be made in connection with a restitution, after taking into

consideration the purpose of this order, the ability to pay of the person liable and the existing statutory prohibitions and limitations on payments.

2. In cases involving the restitution of property in land and interests of a like nature, the claimant may demand that an adequate period not exceeding ten years be allowed for the repayment of the consideration on condition that such repayment be secured by a mortgage in favor of the defendant, bearing interest at 4%, to be executed on the property. The terms shall upon application be laid down by the Restitution Authorities.

3. In cases provided for in Article 27 and Article 30, paragraph 2, the Restitution Authorities shall determine the maturity dates of debts and the terms of payment in such a way that the restitution of the affected property will not be prejudiced in any way nor its enjoyment by the claimant be unduly impaired.

ARTICLE 40—CLAIMS FOR INDEMNIFICATION

1. Claims for indemnification which the defendant may have against his immediate predecessor in interest shall be governed by the rules of the Civil Law. The liability to make restitution shall be deemed to constitute a defect in the title within the meaning of the Civil Code. Section 439, paragraph 1 of the Civil Code shall not be applicable.

2. In case of restitution of real or tangible personal property, any claim provided in paragraph 1 may be asserted not only against the immediate predecessor but also against any mediate predecessor in interest who was not in good faith at the time he acquired the property. Such predecessors in interest shall be liable as joint debtors. They shall not be liable, if the defendant himself was not in good faith.

ARTICLE 41—LIEN OF THIRD PERSONS OVER CLAIMS OF THE DEFENDANT

Any right over or interest in affected property which ceased to be effective by reason of the provisions of Article 30 shall constitute a lien on any claim which the defendant may have for repayment of consideration and for indemnity under this order and on the sum received by the defendant in satisfaction of such claim.

PART VIII—GENERAL RULE OF PROCEDURE

ARTICLE 42—BASIC PRINCIPLES

1. The restitution proceedings shall be commenced by petition and the proceedings shall be conducted in such a manner as to bring about a speedy and complete restitution. For the purpose of this order the filing of a petition in accordance with Berlin Kommandatura Order (49) 26 * shall constitute the filing of a petition.

* Above, p. 39.

2. In ascertaining the relevant facts the Restitution Authorities shall take fully into account the circumstances in which the claimant finds himself as a result of measures of persecution for the reasons referred to in Article 1. This shall apply in particular where the production of evidence is rendered difficult or impossible through the loss of documents, the death or nonavailability of witnesses, or similar circumstances. Sworn declarations made by the claimant or his witnesses shall be admissible notwithstanding the subsequent death of the person making any such declaration.

ARTICLE 43—RIGHT OF SUCCESSION AND FOREIGN LAW

1. Any person who founds a claim upon a right of succession on death shall be required to prove such right.

2. Foreign Law shall be strictly proved where it is unknown to the Restitution Authorities.

ARTICLE 44—PRESUMPTION OF DEATH

Any persecuted person, or any person beneficially interested in his estate, whose last known whereabouts was in Germany or a country under the jurisdiction of, or occupied by Germany or her Allies and as to whose whereabouts or continued existence after May 8, 1945, no information is available, shall be presumed to have died on May 8, 1945; nevertheless, where it appears probable that such person died on a date other than May 8, 1945, the Restitution Authorities may presume such other date as the date of death.

ARTICLE 45—SAFEGUARDING

1. The Restitution Authorities shall, if the situation so requires, safeguard affected property in a suitable manner. To that end they may issue temporary injunctions (*einstweilige Verfügungen*) or restraining orders (*Arrestbefehle*), either on their own initiative or upon application. Such injunctions or orders shall be modified or revoked if the property can be safeguarded by any measures other than those taken or if there is no further need for their continuation.

2. The provisions of the Code of Civil Procedure for the time being in force relating to "*Arrest und einstweilige Verfügungen*," shall apply *mutatis mutandis*.

ARTICLE 46—TRUSTEE

1. Where supervision of any affected property is necessary and no other authority is entitled to exercise jurisdiction thereover a trustee shall be appointed for the purpose.

2. Appointment and supervision of trustees will be in accordance with regulations to be issued.

ARTICLE 47—COMPETENCE OF OTHER AUTHORITIES TO TAKE MEASURES UNDER
ARTICLES 45 AND 46

Where the safeguarding measures described in Articles 45 and 46 are within the competence of another agency, the Restitution Authorities shall request that agency to take such measures.

PART IX—DUTY TO REPORT

ARTICLE 48

1. Any person who has or at any time since January 30, 1933, has had possession, custody, or control of any property to which this order relates, shall make a report in duplicate in respect of such property to the Treuhaender der Amerikanischen, Britischen und Franzoesischen Militaerregierungen fuer zwangsuebertragene Vermoegen, Berlin W 30, Nuernbergerstrasse 53/55 (herein referred to as "the Treuhaender"). Such report will be made pursuant to all terms prescribed in Berlin Kommandatura Order (49) 26, dated February 16, 1949, and must contain information required in the form attached to that order as Appendix A.

2. Any person who has knowledge of any specific transfer since January 30, 1933 of property subject to this order, shall make a declaration in duplicate to the Treuhaender. This declaration must be in accordance with requirements of Berlin Kommandatura Order (49) 26, dated February 16, 1949, in the manner described on form attached to that order as Appendix B.

3. Declarations referred to in paragraphs 1 and 2 hereof must contain the information required by the relevant forms, but the declaration may be on any paper or form available to declarants, providing it is legible.

PART X—FILING OF CLAIMS

ARTICLE 49—FILING OFFICE

1. The Treuhaender der Amerikanischen, Britischen und Franzoesischen Militaerregierungen fuer zwangsuebertragene Vermoegen, Berlin W 30, Nuernbergerstrasse 53/55 (hereinafter referred to as "the Treuhaender"), referred to in Berlin Kommandatura Order (49) 26, dated February 16, 1949, shall perform the functions of a central filing office.

2. This office shall transmit any petition filed with it to the Restitution Agency or Agencies competent to deal with it under the provisions of Article 53.

ARTICLE 50—TIME LIMIT AND OTHER REQUIREMENTS

1. The filing of a petition for restitution shall be made in accordance with the requirements of this order and of Berlin Kommandatura Order (49) 26, dated February 16, 1949, as amplified by the provisions following or any regulations to be issued by the Allied Kommandatura.

2. A petition for restitution shall be deemed to have been submitted in a timely manner if such petition is delivered to the Treuhaender by June 30, 1950, or if the petition or the envelope or other papers accompanying it when received by the Treuhaender clearly show by the official notation of the postal or telegraph, or British, French or US diplomatic authorities that it was posted or received for dispatch to the Treuhaender on or before June 30, 1950, and such petition is received by the Treuhaender not later than August 31, 1950. Petitions received after that date will not be considered to have been submitted within the prescribed period.

3. The petition shall when necessary be substantiated by documents or sworn declarations, or the petition shall contain the information required by this order and by Berlin Kommandatura Order (49) 26 and attachments thereto. However, claimants may supply the required information on any paper available, so long as writing is legible.

4. The petition may be effectively filed by any one of several co-claimants.

5. Any petition filed by a person who is not entitled to restitution of the property shall be deemed to have been effectively filed in favor of the true claimant, or where appropriate, of a trust corporation.

6. Petitions should be written in German, if possible, to facilitate handling by German agencies; but may be written in French or English. They need not be submitted on forms prescribed for petitions in Berlin Kommandatura Order (49) 26, but shall contain the information required by Appendix C of that order, and must be legibly written.

7. The time limit for the submission of the report or declaration referred to in paragraphs 4 and 5 of Berlin Kommandatura Order (49) 26 and Article 48 of this order is hereby extended to February 16, 1950.

ARTICLE 51—RELATION TO OTHER REMEDIES

Unless otherwise provided in this order, any claim within the scope of this order may be prosecuted only under the provisions and within the limits of time laid down in this order. Any claim based on a cause of action outside the scope of this order may be prosecuted in the ordinary courts.

ARTICLE 52—CONTENTS OF PETITION TO BE FILED

1. The petition shall contain a description of the affected property and such other particulars as a claimant is required to give in the form referred to in Berlin Kommandatura Order (49) 26.

2. The Treuhaender or the Restitution Authorities may request the claimant to supplement his petition by a statement (in an appropriate case by way of sworn declaration) containing such information as may be necessary for the purpose of adjudicating the claim.

3. If the claimant has no domicile or residence in Germany and has not appointed there an attorney authorized to accept service of process, he may nominate a person domiciled there for such purpose. If he fails to nominate such a person within a reasonable time, the Restitution Agency shall do so and notify the claimant of the appointment.

4. The Treuhaender shall notify the claimant of the Restitution Agency or Agencies to which the petition has been transmitted pursuant to Article 49, paragraph 2.

5. The time-table prescribed in Article 50 shall be deemed to have been complied with notwithstanding any formal or other defects in the petition.

ARTICLE 53—VENUE

1. Any petition for restitution shall be transmitted by the Treuhaender to the Restitution Agency of the district in which the affected property is situated. If it appears that a petition has been transmitted to a Restitution Agency which lacks jurisdiction, such petition shall be referred by such Restitution Agency to the Restitution Agency having jurisdiction. The order of reference shall be binding on the Agency to which the petition has been so referred.

2. Regulations may provide for additional rules as to venue, and in particular as to claims for compensation and ancillary claims.

ARTICLE 54—JURISDICTION RATIONE MATERIAE

The Restitution Authorities shall have jurisdiction *ratione materiae* irrespective of whether under any other statutory provision a claim for restitution would come within the jurisdiction of any ordinary administrative or other court or whether no court whatsoever would have jurisdiction.

ARTICLE 55—NOTICE OF CLAIM

1. The Restitution Agency shall give notice of the petition by formal service on the parties concerned requiring that an answer be filed within two months of such service. Parties concerned shall be deemed to be the defendant, lessees or tenants of, or persons holding other interests in, the affected property, as well as any other person the claimant may demand to be joined in the proceedings. If the German Reich, a former Land, the City of Berlin, the former NSDAP or one of its formations or affiliated organizations is a party concerned, service shall be made upon the Oberbuergermeister von Gross-Berlin. If a presently existing Land or Province is a party concerned, service shall be made upon the appropriate Minister of Finance of the Land. In the cases last mentioned the City of Berlin, the Land or the Province shall be authorized to join in the proceedings as a party having an interest therein. The provisions of this paragraph shall

not impose any liability upon the City of Berlin other than that which may arise by reason of other provisions of this order.

2. Where the identity or present address of a defendant is unknown or where it appears from the petition that any unidentified third person may have an interest in the affected property, the Restitution Agency shall effect service of notice of the petition by publication requiring the defendant and the unidentified third person to declare within two months to the Restitution Agency their interests (with proof thereof). Service by publication shall be effected in accordance with the provisions of Section 204, paragraph 2, of the Code of Civil Procedure as amended by Control Council Law No. 38 in the form applicable to a summons. Service shall be deemed to be effective one month after publication in the periodical specified in Section 204, paragraph 2, of such Code. Special regulations may be issued to provide for additional methods of service.

3. Upon service of the petition the case shall be deemed to be a *lis pendens* (*rechtshaengig*).

4. When the claim for restitution affects property in land or an interest of a like nature, the Restitution Agency shall request that an entry be made in the Land Title Register to the effect that a claim for restitution has been filed (*Rueckerstattungsvermerk*). The notice of restitution shall be effective against any third person.

5. The provision of the Code of Civil Procedure concerning Third Party procedure shall apply *mutatis mutandis*.

ARTICLE 56—PROCEDURE BEFORE THE RESTITUTION AGENCY

1. If no answer is made to the petition within the time specified in the notice, the Restitution Agency shall issue an order granting the petition. Where there is no dispute as to the limit of encumbrances and as to the continued existence of rights or interests, the Restitution Agency shall also make the appropriate findings on such matters.

2. Where a petition for restitution does not disclose a cause of action, or the truth of any of the allegations contained therein is controverted by entries in public records or by public documents available to the Restitution Agency, the latter Agency shall require the claimant to submit a statement within an appropriate period of time. The Agency shall dismiss the petition on the merits if the claimant does not within this period submit an explanation justifying his petition or supplementing the facts alleged therein.

3. Where an answer is filed but an amicable settlement is reached the Restitution Agency shall, on application, record the settlement in writing, and shall deliver a certified copy of the terms thereof to the parties concerned.

ARTICLE 57—REFERENCE TO THE COURT

1. If an amicable agreement cannot be reached either wholly or in part or if the requisite measures to be taken are not within the competence of the Restitution Agency, it shall to the extent necessary refer the case to the Restitution Chamber of the Landgericht having jurisdiction over the Restitution Agency. This shall apply in particular to cases where only the limits of encumbrances or the continued existence of rights or interests or the liability for debts is in dispute.

ARTICLE 58—APPEAL (EINSPRUCH)

1. Any party may, by filing an appeal with the Restitution Agency, appeal to the Restitution Chamber against a decision of the Restitution Agency given pursuant to Article 53, paragraph 1, second sentence, or Article 56, paragraphs 1 and 2; notice of appeal shall be filed within one month unless the appellant resides in a foreign country, in which case the period shall be three months. The time for appeal shall begin to run from the service of the decision appealed against. Article 55, paragraph 2, shall apply *mutatis mutandis*.

2. An appeal shall be permissible only when it is founded on a violation of the provisions of Article 53, paragraph 1, second sentence, or Article 56, paragraph 1 or 2.

ARTICLE 59—EXECUTION

Agreements recorded by the Restitution Agency and orders of the Restitution Agency which are no longer subject to appeal may be enforced by execution pursuant to the provisions of the Code of Civil Procedure. For this purpose, the Restitution Agency shall have the powers of a court (*Vollstreckungsgericht*). In effecting execution, the Restitution Agency may avail itself of the services of other agencies and in particular of the courts.

PART XI—JUDICIAL PROCEEDINGS

ARTICLE 60—MEMBERS OF THE RESTITUTION AGENCIES AND THE RESTITUTION CHAMBER

1. The Restitution Agencies shall be composed of a Chairman, who shall have the qualifications of a Judge, and two members qualified for the higher administrative service.

2. The Restitution Chamber shall be composed of a Presiding Judge and two Associate Judges, eligible for the office of judge or for the higher administrative service, to be assigned from among the judges of the Landgericht.

ARTICLE 61—PROCEDURE

1. The Restitution Chamber shall adjust the legal relations of the parties in accordance with the provisions of this order.

2. Unless otherwise provided in this order, the procedure shall be governed by the rules applicable to matters of non-contentious litigation, subject, however, to the following modifications:

(a) The Chamber shall order an oral hearing which shall be public.

(b) The proceedings may at the request of the claimant be stayed for a period not exceeding six months.

(c) The Chamber may give a judgment on part of the claim (*Teilurteil*) before it, or on part of a claim, where the determination of any counterclaim, set-off or lien or any other defense in the nature of a set-off or counterclaim would substantially delay the decision on restitution.

(d) Without prejudice to the final decision, the Chamber may order the temporary surrender of the affected property to the claimant either with or without security. In such cases the claimant shall have, with respect to third persons, the rights and obligations of a trustee (*Treuhaender*).

ARTICLE 62—FORM AND CONTENTS OF THE DECISION

1. The Decision of the Restitution Chamber shall be pronounced in an order, the grounds for which shall be given. Such order shall be served on the parties concerned. The order may be enforced by execution, a subsequent appeal notwithstanding. The provisions of Section 713, paragraph 2, and Sections 713a to 720 of the Code of Civil Procedure shall apply *mutatis mutandis*.

2. An objection (*sofortige Beschwerde*) may be made against the order by filing notice of such objection within one month or, in the case of a person residing in a foreign country, within three months. The time for giving notice of objection shall begin to run from the date of service of the order. Article 55, paragraph 2, shall apply *mutatis mutandis*. The *Kammergericht* shall hear the objection. The objection may be founded only on an allegation that the decision violated the Law. The provisions of Sections 551, 561 and 563 of the Code of Civil Procedure shall apply *mutatis mutandis*.

ARTICLE 63—POWERS OF REVIEW

A Board (or boards) shall have the power to review any decision on any petition for restitution under this order and to take whatever action is deemed necessary with respect thereto. Regulations of Military Government will provide for the appointment and composition of such Board (or boards), its jurisdiction, procedure, and such other matters as are deemed appropriate.

PART XII—SPECIAL PROVISIONS**ARTICLE 64—CONFLICT OF JURISDICTION**

1. If any claim of any of the kinds specified in Articles 1 to 41 is made by a person entitled to restitution in proceedings before a court or by way of execution, defense or counterclaim, the court concerned shall notify the Restitution Agency. The court may, and on request of the Restitution Chamber shall, stay the proceedings or temporarily suspend execution by an order against which there may be no appeal. The Restitution Chamber may direct that the claim be dealt with under this order and not by exercise of jurisdiction by the ordinary courts, or it may authorize the claimant to prosecute his claim before such courts; in which latter case the authorization shall be binding on the courts. If an action in the ordinary civil courts is terminated by reason of the claim being dealt with under this order, any court fees charged shall be remitted and neither party shall be entitled to any extra-judicial costs.

2. The court shall report to the Treuhaender any measures taken under paragraph 1.

PART XIII—PROVISIONS AS TO COSTS**ARTICLE 65—COSTS**

1. No court fees shall normally be charged in proceedings before Restitution Authorities. Regulations may, nevertheless, provide for the levying of costs, fees, and expenses in certain cases.

2. No advance payment, or bond or security for costs may be demanded from a claimant.

PART XIV**ARTICLE 66—PENALTIES**

1. Any person who alienates, damages, destroys, or conceals any affected property in order to defeat the rights of a claimant shall upon conviction be punished with imprisonment not exceeding five years, or a fine, or both, unless heavier penalties under any other law are applicable.

2. Penal servitude not exceeding five years may be imposed in especially serious cases.

3. An attempt shall be punishable.

**PART XV—RESTORATION OF RIGHTS OF SUCCESSION
AND ADOPTION****ARTICLE 67—EXCLUSION FROM INHERITANCE**

1. An exclusion from the right of succession by will or on intestacy or the forfeiture of an estate which occurred during the material period by virtue of a legislative measure for any of the reasons referred to in Article 1 shall be deemed not to have occurred.

2. For the purpose of determining any periods of limitation, the event giving rise to the succession shall be deemed to have occurred on the effective date of this order.

ARTICLE 68—AVOIDANCE OF TESTAMENTARY DISPOSITIONS AND OF
DISCLAIMERS OF INHERITANCE

1. Testamentary dispositions and contracts of inheritance made in the material period by virtue of which any descendant, parent, grandparent, brother, sister, half-brother, half-sister, or their descendants, as well as a spouse, was excluded from inheritance for the purpose of avoiding a seizure of the estate by the State, anticipated by the party making the disposition, for any of the reasons referred to in Article 1, shall be capable of being avoided. Subject to the provisions of paragraph 3 of this Article the power of avoidance shall be governed by Sections 2080 et seq. or 2281 et seq. of the Civil Code.

2. Disclaimers of inheritance by persons described in paragraph 1 shall be capable of being avoided provided such disclaimers were made within the material period in order to prevent an anticipated seizure of the property by the State, for any of the reasons referred to in Article 1. Subject to the provisions of paragraph 3 of this Article, the right of avoidance shall be governed by Sections 1954 et seq. of the Civil Code.

3. Testamentary dispositions, contracts of inheritance or disclaimers of inheritance must be avoided not later than June 30, 1950.

ARTICLE 69—TESTAMENTARY DISPOSITION OF A PERSECUTED PERSON

1. A testamentary disposition made within the material period shall be valid, notwithstanding noncompliance in whole or in part with any formal requirements, if the testator made such disposition in view of an actual or imagined immediate danger to his life, based on measures of persecution for any of the reasons referred to in Article 1, and where the circumstances were such that he could not reasonably be expected to comply with the statutory formal requirements.

2. The provisions of paragraph 1 shall not apply if the testator was still capable of making a testamentary disposition complying with the statutory requirements after September 30, 1945.

ARTICLE 70—RE-ESTABLISHMENT OF ADOPTION

1. If an adoption relationship was revoked within the material period for any of the reasons referred to in Article 1, such relationship may be reinstated nunc pro tunc by a contract between the foster-parent or his heirs and the child or his heirs. Sections 1741 to 1772 of the Civil Code, with the exceptions of Sections 1744, 1745, 1747, 1752 and 1753, shall apply to

the contract of reinstatement. A contract of reinstatement may be judicially confirmed notwithstanding the death of the parties to it. If one of the parties concerned is not capable of being brought before the court, a guardian ad litem (Pfleger) may be appointed to represent his interests in the proceedings for reinstatement.

2. Where an adoption was revoked by decision of a court during the material period for any of the reasons referred to in Article 1 and no facts appeared which would have entitled any of the contracting parties to revoke the adoption subsequently on his own initiative, such party or his heirs may require that the decision be quashed.

3. The Amtsgericht which cancelled the adoption shall have jurisdiction in cases falling within the provisions of paragraph 2. Paragraph 1, fourth sentence, shall apply *mutatis mutandis*. The decision of the court shall be discretionary and shall take into account the interests of the parties. Upon a revocation of the order cancelling the adoption, the adoption shall be deemed to be reinstated *nunc pro tunc*. The court may stipulate that certain parts of its order shall not have retrospective effect.

4. No costs or fees shall be charged in such proceedings.

5. An application for re-establishment of an adoption must be made on or before June 30, 1950.

ARTICLE 71—JURISDICTION

Any claims arising under Articles 67 to 70 shall be decided by the ordinary civil courts. A filing of a claim with the Treuhaender shall not be necessary, but the Treuhaender shall be informed of any action entered in conformity with Articles 67 to 70.

PART XVI—REINSTATEMENT OF TRADE NAMES AND OF NAMES OF ASSOCIATIONS

ARTICLE 72—RE-REGISTRATION OF CANCELLED TRADE NAMES

1. Where a trade name was cancelled in the Commercial Register within the material period after the business establishment had been closed for any of the reasons referred to in Article 1, the cancelled trade name shall on application be registered if the business is reopened by its last owner or owners or his or their heirs.

2. If the business establishment closed was conducted at the time of its closing by a single owner, the last owner or his heirs shall be entitled to demand the re-registration of the cancelled trade name. If there are several heirs, and if not all of them participate in the resumption of the enterprise, the re-registration of the cancelled trade name may be demanded, provided that the heirs who do not participate in the business assent to the resumption of the trade name.

3. If at the time of its closing the business establishment was conducted by several partners personally liable, re-registration of the cancelled trade

name may be demanded if all the partners so liable establish a business enterprise, or if one or several of them do so with the consent of the remaining partners; in respect of heirs of partners the provisions of paragraph 2 shall apply *mutatis mutandis*.

ARTICLE 73—CHANGE OF FIRM NAME

Where a firm's name was changed in the material period for any of the reasons referred to in Article 1, the former firm's name may be restored upon the application of the person who owned the business concern at the time the change was made, or of his heirs, provided he or they now own the enterprise. The provisions of Article 72, paragraph 2, second sentence, and paragraph 3, shall apply *mutatis mutandis*.

ARTICLE 74—NAMES OF JURISTIC PERSONS

The provisions of Articles 72 and 73 shall be applicable to the trade names of juristic persons.

ARTICLE 75—REINSTATEMENT OF TRADE NAMES IN OTHER CASES

Whenever the use of a former trade name is requisite to secure full restitution, the Restitution Chamber may permit the reinstatement of a cancelled or changed trade name in cases other than those provided for in Articles 72 to 74.

ARTICLE 76—NAMES OF ASSOCIATIONS AND ENDOWMENTS (STIFTUNGEN)

Article 75 shall apply *mutatis mutandis* to the resumption by an association or an endowment of its former name.

ARTICLE 77—PROCEDURE

Applications for the registration in the Commercial Register of former firm and trade names must be filed within the period prescribed by this order for the filing of claims for restitution. The Amtsgericht in its capacity as Court of Registry shall have jurisdiction over these applications except in the cases provided for in Article 75. In all other respects the procedure shall be governed by the rules of procedure applicable to matters of non-contentious litigation. No costs or fees shall be charged in such proceedings.

PART XVII—FINAL PROVISIONS

ARTICLE 78—LIMITATION

To the extent to which the provisions of the Civil Code as to limitation of actions, or as to prescriptive rights, defeat any claim falling under this order, any relevant periods of limitation or prescription shall be deemed

not to have expired until six months after such cause of action arises by reason of the operation of this order, and in no event prior to December 31, 1950.

ARTICLE 79—TAXES AND OTHER LEVIES

1. Taxes and other public levies shall not be imposed in connection with restitution. No fiscal claims shall be imposed on a claimant in respect of the period during which he was unjustly deprived of the affected property.

2. No taxes, including inheritance taxes, or other public assessments, fees, or costs shall be refunded in connection with the return of affected property.

ARTICLE 80—IMPLEMENTING AND CARRYING-OUT PROVISIONS

Unless otherwise provided for in this order or ordered by the Allied Kommandatura, the Magistrat or Stadtverordnetenversammlung of the City of Berlin shall issue the legal and administrative regulations necessary for the implementation of this order.

ARTICLE 81—JURISDICTION OF GERMAN COURTS

Subject to the limitations on the jurisdiction of German courts imposed by Military Government Law No. 2, so far as applicable in Berlin, and by supplemental orders issued by the Allied Kommandatura, German courts are hereby authorized to exercise jurisdiction in cases involving offenses against any of the provisions of Article 66.

ARTICLE 82

The Allied Kommandatura, if it considers it advisable or necessary, will publish implementing regulations.

ARTICLE 83—EFFECTIVE DATE

This order comes into force on the twenty-sixth day of July 1949.

ARTICLE 84

Acknowledge receipt of this order citing number and date.

By order of the Allied Kommandatura Berlin.

LT. COL. G. M. OBORN,
Chairman Chief of Staff.

[SEAL]

EDWARD F. WITSELL,
Major General,
The Adjutant General.

[F. R. Doc. 49-7081; Filed, Aug. 31, 1949; 8:59 a. m.]

MUTUAL DEFENSE ASSISTANCE

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA
AND THE UNITED KINGDOM OF GREAT BRITAIN AND
NORTHERN IRELAND

*Signed at Washington, January 27, 1950; in force same date*¹

The Governments of the United States of America and the United Kingdom of Great Britain and Northern Ireland,

Being parties to the North Atlantic Treaty signed at Washington on April 4, 1949;²

Considering their reciprocal pledges under Article 3 of the North Atlantic Treaty separately and jointly with the other parties, by means of continuous and effective self-help and mutual aid, to maintain and develop their individual and collective capacity to resist armed attack;

Desiring to foster international peace and security, within the framework of the Charter of the United Nations through measures which will further the ability of nations dedicated to the purposes and principles of the Charter to participate effectively in arrangements for individual and collective self-defense in support of those purposes and principles;

Reaffirming their determination to give their full coöperation to the efforts to provide the United Nations with armed forces as contemplated by the Charter and to obtain agreement on universal regulation and reduction of armaments under adequate guarantee against violation;

Recognizing that the increased confidence of free peoples in their own ability to resist aggression will advance economic recovery;

Taking into consideration the support that has been brought to these principles by the Government of the United Kingdom in affording military assistance to other parties of the North Atlantic Treaty and by the Government of the United States of America in enacting the Mutual Defense Assistance Act of 1949³ which provides for the furnishing of military assistance to nations which have joined with it in collective security arrangements;

Desiring to set forth the conditions which will govern the furnishing of

¹ Department of State Press Release No. 88, Jan. 27, 1950; Bulletin, Vol. XXII, No. 554 (Feb. 13, 1950), p. 253. Similar agreements were signed the same day with Belgium, Denmark, France, Italy, Luxembourg, The Netherlands and Norway (Press Releases Nos. 83-87, 89, 90, Jan. 27, 1950), Department of State Bulletin, Vol. XXII, No. 553 (Feb. 6, 1950), pp. 200-211; No. 554 (Feb. 13, 1950), pp. 247-253; No. 555 (Feb. 20, 1950), pp. 293-295. On January 26, 1950, the signing of a mutual assistance agreement with the Republic of Korea under the terms of the Mutual Defense Assistance Act of 1949 was announced by the Department of State. The agreement went into force on signature.

² This JOURNAL, Supp., Vol. 43 (1949), p. 159.

³ *Ibid.*, Vol. 44 (1950), p. 29.

military assistance by one contracting Government to the other under this Agreement;

Have agreed as follows:

ARTICLE I

1. Each contracting Government, consistently with the principle that economic recovery is essential to international peace and security and must be given clear priority, and in accordance with its obligations under Article 3 of the North Atlantic Treaty, will make available to the other such equipment, materials, services, or other military assistance as the contracting Government furnishing such assistance may authorize, in accordance with detailed arrangements from time to time to be made between them. The Government of the United Kingdom in fulfilment of its obligations under Article 3 of the North Atlantic Treaty will furnish or continue to furnish to other parties to the North Atlantic Treaty such equipment, materials, services, or other military assistance as it may authorize. The furnishing of assistance by the Government of the United States of America under this Agreement will be under the provisions, and subject to all the terms, conditions, and termination provisions of the Mutual Defense Assistance Act of 1949, acts amendatory and supplementary thereto and appropriation acts thereunder.

2. Such assistance shall be so designed as to promote the integrated defense of the North Atlantic area and to facilitate the development of, or be in accordance with, defense plans under Article 9 of the North Atlantic Treaty approved by each contracting Government.

ARTICLE II

1. Each contracting Government undertakes to make effective use of assistance received pursuant to Article I of this Agreement

- (a) for the purpose of promoting an integrated defense of the North Atlantic Area, and for facilitating the development of defense plans under Article 9 of the North Atlantic Treaty; and
- (b) in accordance with defense plans formulated by the North Atlantic Treaty Organization, recommended by the North Atlantic Treaty Council and Defense Committee, and agreed to by the two contracting Governments.

2. Neither contracting Government, without the prior consent of the other, will devote assistance furnished to it by the other contracting Government to purposes other than those for which it was furnished.

ARTICLE III

In the common security interest of both contracting Governments, each contracting Government undertakes not to transfer to any person not an

officer or agent of such contracting Government, or to any other nation, title to or possession of any equipment, materials, or services, furnished on a grant basis, without the prior consent of the contracting Government furnishing such equipment, materials, or services.

ARTICLE IV

The provisions of Article V of the Economic Coöperation Agreement signed at London on July 6, 1948, shall be regarded as an integral part of this Agreement.*

ARTICLE V

1. Each contracting Government will take such security measures as may be agreed in each case between the two contracting Governments in order to prevent the disclosure or compromise of any classified military articles, services, or information furnished by the other contracting Government pursuant to this Agreement.

2. Each contracting Government will take appropriate measures consistent with security to keep the public informed of activities under this Agreement.

ARTICLE VI

1. The two contracting Governments will negotiate appropriate arrangements between them respecting responsibility for claims for the use or infringement of inventions covered by patents or patent applications, trademarks, or copyrights, or other similar claims arising from the use of devices, processes, or technological information in connection with equipment, materials, or services furnished pursuant to this Agreement, or furnished in the interests of production undertaken by agreement between the two contracting Governments in implementation of the pledges of self-help and mutual aid contained in the North Atlantic Treaty.

ARTICLE VII

1. Subject to the provision of the necessary appropriations, the Government of the United Kingdom will make available to the Government of the United States of America sterling for the use of the latter Government for its administrative expenditures within the United Kingdom in connection with assistance furnished by the Government of the United States of America to the Government of the United Kingdom under this Agreement.

2. The two contracting Governments will initiate forthwith discussions with a view to determining the amount of such sterling and agreeing upon arrangements for the furnishing of such sterling.

* Department of State, Treaties and Other International Acts Series, No. 1795 (Publication 3273).

ARTICLE VIII

1. Except as otherwise agreed, the Government of the United Kingdom will grant exemption from customs duties and other taxes on importation and also from taxes on exportation, in respect of goods owned by the Government of the United States of America and imported by it into the United Kingdom as assistance under this Agreement or as assistance under any similar agreement between the United States of America and any other party to the North Atlantic Treaty.

2. Goods imported under this exemption may not be disposed of by way either of sale or gift in the country into which they have been imported, except to a Government party to the North Atlantic Treaty or under conditions agreed with the Government of the country into which they have been imported.

ARTICLE IX

1. Each contracting Government agrees to receive personnel of the other contracting Government who will discharge in its territories the responsibilities of the latter Government under this Agreement and will be accorded facilities to observe the progress of assistance furnished in pursuance of this Agreement.

2. Such personnel will, in their relations to the Government of the country to which they are assigned, operate as part of the Embassy under the direction and control of the Chief of the Diplomatic Mission of the Government which they are serving.

3. The Government of the United Kingdom will, upon appropriate notification from the Ambassador of the United States of America in the United Kingdom, consider such personnel as part of the Embassy of the United States of America in the United Kingdom for the purpose of enjoying the privileges and immunities accorded to that Embassy and its personnel of comparable rank.

ARTICLE X

The furnishing of any assistance under this Agreement shall be consistent with the obligations of the two contracting Governments under the Charter of the United Nations and under Article 3 of the North Atlantic Treaty.

ARTICLE XI

1. The two contracting Governments will, upon the request of either of them, consult regarding any matter relating to the application of this Agreement or to operations or arrangements carried out pursuant to this Agreement.

2. The terms of this Agreement shall at any time be reviewed at the request of either contracting Government. Such review shall take into account, where appropriate, agreements concluded by either contracting

Government in connection with the carrying out of Article 9 of the North Atlantic Treaty.

3. This Agreement may be amended at any time by agreement between the two contracting Governments.

ARTICLE XII

1. This Agreement shall enter into force on notification to the Government of the United States of America by the Government of the United Kingdom of its acceptance thereof.⁵

2. This Agreement will terminate one year after the receipt of notification by either contracting Government of the intention of the other to terminate it.

3. The Annexes to this Agreement form an integral part thereof.

In witness whereof the respective representatives, duly authorized for the purpose, have signed the present Agreement.

Done at Washington, in duplicate, this twenty-seventh day of January, 1950.

OLIVER FRANKS

DEAN ACHESON

ANNEX A

During the course of negotiations, representatives of the two contracting Governments have stated their understanding that either contracting Government shall be free at any time to suspend or terminate the furnishing of assistance under Article I of the Mutual Defense Assistance Agreement.

ANNEX B

In the course of discussions of the Mutual Defense Assistance Agreement under the United States Mutual Defense Assistance Act of 1949, the following understandings were reached by the representatives of the Governments of the United States of America and the United Kingdom:

1. For the purposes of Article II, fungible materials and minor items of equipment which are, for all practical purposes fungible, shall be treated as such. Accordingly, in the case of such fungible materials or equipment, the requirements of Article II will be satisfied if each contracting Government devotes to the purposes of this Article either the particular items furnished or an equivalent quantity of similar and substitutable items.

2. Similarly, in the case of finished products manufactured by either contracting Government with assistance furnished under this Agreement, the requirements of Article II will be satisfied if the recipient Government devotes to the purposes of Article II either such finished products or an equivalent quantity of similar and substitutable finished products.

⁵ Notification of acceptance of the agreement by the Government of the United Kingdom was given to the United States Government on Jan. 27, 1950.

3. Further, in the light of paragraphs 1 and 2 above, neither contracting Government will refuse its consent under Article III to the transfer of a major item of indigenous equipment merely because there may have been incorporated into it as an identifiable component part a relatively small and unimportant item of assistance furnished under this Agreement by the other contracting Government. The two contracting Governments will forthwith discuss detailed arrangements for a practical procedure for granting consent in respect of the types of transfer referred to in this paragraph.

4. Each contracting Government will nevertheless make all practicable efforts to use items of assistance for the purposes for which they may have been furnished by the other.

ANNEX C

It is understood that for the purpose of furthering the mutual defense of the two countries the obligations undertaken by the Government of the United Kingdom by virtue of Article IV of the Mutual Defense Assistance Agreement will continue to apply to the United Kingdom of Great Britain and Northern Ireland after the termination of the Economic Coöperation Agreement. The Government of the United Kingdom intends to consult the Governments of the territories to which the Economic Coöperation Agreement has been or may be extended under Article XII of that Agreement with a view to securing their consent to the continued extension to those territories of the provisions of Article V of the Economic Coöperation Agreement, so long as those provisions remain an integral part of the Mutual Defense Assistance Agreement.

ANNEX D

During the course of the negotiations of the Mutual Defense Assistance Agreement, the representatives of the two contracting Governments have reached the understanding that the following points will be considered in the negotiations provided for in Article VI:

(a) The inclusion of an undertaking whereby each contracting Government would assume the responsibility for all the patent or similar claims of its nationals referred to in Article VI of the said Agreement and for such claims arising in its jurisdiction of nationals of any country not a party to this Agreement.

(b) The terms on which inventions would be communicated to contractors with a view to protecting the commercial rights of inventors.

(c) Rights in improvements or other modifications of patented inventions.

(d) Arrangements for the protection of secret processes and secret technological information, as distinct from patented and patentable inventions.

(e) The system for disclosing the users and the extent of the use of the patents, trade secrets and copyrights referred to in Article VI.

ANNEX E

Provision is made in Article VII, paragraph 1, of the Mutual Defense Assistance Agreement as follows:

"Subject to the provision of the necessary appropriations, the Government of the United Kingdom will make available to the Government of the United States of America sterling for the use of the latter Government for its administrative expenditures within the United Kingdom in connection with assistance furnished by the Government of the United States of America to the Government of the United Kingdom under this Agreement."

In the course of discussions on the Agreement, representatives of the Government of the United States of America stated that in the event that the Government of the United Kingdom shall in the future furnish grant assistance to the Government of the United States of America, involving the delivery of materials and equipment to the United States, the Government of the United States of America, if so requested by the Government of the United Kingdom, and subject to legislative authorization, shall provide dollars for the use of the Government of the United Kingdom for its administrative expenditures within the United States in connection with the furnishing of such assistance. The representatives of the Government of the United States of America advised the representatives of the Government of the United Kingdom that dollar expenditures in the United States which may be incurred as a result of the training of British personnel in the United States under this Agreement can be met out of funds made available under the United States Mutual Defense Assistance Act of 1949.

ANNEX F

In implementation of paragraph 1 of Article VII of the Mutual Defense Assistance Agreement between the Governments of the United States of America and of the United Kingdom, the Government of the United Kingdom will deposit sterling at such times as requested in an account designated by the United States Embassy at London, not to exceed in total 53,500 pounds for its use on behalf of the Government of the United States for administrative expenditures within the United Kingdom in connection with carrying out that Agreement for the period ending June 30, 1950.

ANNEX G

Provision is made in Article VIII, paragraph 1, of the Mutual Defense Assistance Agreement, as follows:

"Except as otherwise agreed, the Government of the United Kingdom will grant exemption from customs duties and other taxes on importation and also from taxes on exportation, in respect of goods

owned by the Government of the United States and imported by it into the United Kingdom as assistance under this Agreement, or as assistance under any similar agreement between the United States of America and any other party to the North Atlantic Treaty."

In the course of discussions on the Agreement, representatives of the Government of the United States of America stated that in the event that the Government of the United Kingdom shall in the future furnish grant assistance to the Government of the United States of America, involving the delivery of materials and equipment to the United States, the Government of the United States of America, if so requested by the Government of the United Kingdom, and subject to legislative authorization, will, except as otherwise agreed to, grant duty-free treatment and exemption from internal taxation upon importation or exportation to such materials and equipment imported into its territory in connection with this Agreement.

ANNEX H

With respect to Article VIII, paragraph 1, of the Mutual Defense Assistance Agreement, the representatives of the United Kingdom stated that arrangements would be made wherever possible within the framework of existing United Kingdom legislation to exempt items of assistance, imported by the Government of the United Kingdom into the United Kingdom as assistance under the Agreement, from customs duties and other taxes on importation.

ANNEX I

Provision is made in Article IX, paragraph 1, of the Mutual Defense Assistance Agreement, as follows:

"Each contracting Government agrees to receive personnel of the other contracting Government who will discharge in its territories responsibilities of the latter Government under this Agreement and who will be accorded facilities to observe the progress of the assistance furnished in pursuance of this Agreement."

In the course of discussions on the Agreement, representatives of the two Governments have stated on behalf of their respective Governments that the facilities to be so accorded shall be reasonable and not unduly burdensome upon the Government according such facilities.

ANNEX J

It is understood that the Government of the United States of America in making the notifications referred to in Article IX, paragraph 3, of the Mutual Defense Assistance Agreement, would bear in mind the desirability of restricting, so far as practicable, the number of officials for whom full diplomatic privileges would be requested. It is also understood

that the detailed application of Article IX, paragraph 3, would, when necessary, be the subject of intergovernmental discussion.

ANNEX K

Whereas this Agreement, having been negotiated and concluded on the basis that the Government of the United States of America will extend to the other party thereto the benefits of any provision in a similar agreement concluded by the Government of the United States of America with any other country party to the North Atlantic Treaty, it is understood that the Government of the United States of America will interpose no objection to amending this Agreement in order that it may conform, in whole or in part, to any other similar agreement, or agreements amendatory or supplementary thereto, concluded with a party to the North Atlantic Treaty.

EXECUTIVE ORDER 10099 ON MUTUAL DEFENSE ASSISTANCE¹

By virtue of the authority vested in me by section 404 of the Mutual Defense Assistance Act of 1949, approved October 6, 1949 (Public Law 329, 81st Congress), hereinafter referred to as the Act, and as President of the United States, it is hereby ordered as follows:

1. (a) The Secretary of State is authorized and directed to perform the functions and exercise the powers and authority vested in the President by the Act, except by section 303, section 405, subsection (e) of section 406, clause 2 of subsection (b) of section 407, and subsection (b) of section 411 thereof.

(b) Within the scope of the authority delegated to him by this order, the Secretary of State shall (1) have responsibility and authority for the direction of the programs authorized by the Act, (2) make full and effective use of agencies, departments, establishments, and wholly-owned corporations of the Government, with the consent of the respective heads thereof, in the conduct of operations under such programs, and coördinate the operations of such programs among them, and (3) advise and consult with the Secretary of Defense and the Administrator for Economic Coöperation in order to assure the coördination of the mutual defense assistance activities with the national defense and economic recovery programs.

2. All assistance provided to recipient countries under the authority delegated by this order shall be in conformity with programs approved by the Secretary of State after consultation with the Secretary of Defense and the Administrator for Economic Coöperation. As provided in section 401 of the Act, no equipment or material may be transferred out of military stocks if the Secretary of Defense, after consultation with the Joint Chiefs of Staff, determines that such transfer would be detrimental to the national

¹ Department of State Bulletin, Vol. XXII, No. 555 (Feb. 20, 1950), p. 296.

security of the United States or that such equipment or material is needed by the reserve components of the armed forces to meet their training requirements. The Administrator for Economic Coöperation shall advise the Secretary of State concerning the effect of programs approved by the Secretary of State under the authority delegated to him by this order upon the achievement of the purposes of the Economic Coöperation Act of 1948,² as amended, and of the purposes of the United States program of economic assistance in Korea.

3. Funds appropriated or otherwise made available for the purposes of carrying out the portions of the Act pertinent to the authority delegated by this order may be allocated by the Secretary of State to any agency, department, establishment, or wholly-owned corporation of the Government for obligation and expenditure in accordance with programs approved by the Secretary of State under such authority.

HARRY S. TRUMAN

THE WHITE HOUSE

January 27, 1950

CZECHOSLOVAKIA

LAW OF JULY 13TH, 1949 CONCERNING ACQUISITION AND LOSS OF CZECHOSLOVAK NATIONALITY¹

In force October 1, 1949

The National Assembly of the Czechoslovak Republic resolved to enact as follows:

PART ONE

ACQUISITION OF NATIONALITY

Sec. 1

By Birth

(1) A child who is born in the territory of the Czechoslovak Republic and whose father or mother is a national, acquires nationality by birth.

(2) A child who is born abroad, acquires nationality by birth, if his father and mother are nationals; a child who is born abroad and whose father or mother is a national, while the other parent is a foreigner, acquires nationality, if the National Circuit Committee declares its consent thereto, upon application by the parent who is a national. An application for consent may be filed within one year from the birth.

(3) A child who was found in the territory of the Czechoslovak Republic, at a tender age, is a national until it is proven that he has another nationality.

² See this JOURNAL, Supp., Vol. 43 (1949), p. 64.

¹ Collection of Laws of the Czechoslovak Republic, No. 194, Aug. 10, 1949, effective Oct. 1, 1949. Translation by Mr. Paul Reiner of New York.

Sec. 2

By Marriage

(1) An alien woman acquires nationality by marriage to a national, if the National Circuit Committee declares its consent to the acquisition, upon her application. An application for consent may be filed even before the marriage, but shall not be filed later than six months after the marriage. Even where the consent was granted after the marriage, the alien bride is considered to have acquired nationality as of the day of marriage.

(2) With the alien bride, her children younger than 15 years of age whom she included in her application, acquire nationality.

Sec. 3

By Grant

(1) The Ministry of Interior grants nationality to applicants who

(a) have not committed any offense against the Czechoslovak Republic or its system of people's democracy;

(b) have had a domestic residence continuously for at least five years;

(c) will, upon acquisition of nationality, lose the nationality they had so far, unless they are stateless persons.

(2) The Ministry of Interior grants nationality in its free discretion; in instances worthy of special consideration, it may grant it also to a person who does not come within the provisions of paragraph (1) (b) and (c).

(3) Spouses may apply for the grant of nationality in a joint application; the application of each spouse is considered separately. Children under 15 years of age whom their father or mother included in their applications, acquire nationality at the same time as their father or mother acquires it.

Sec. 4

Oath of Allegiance

(1) The acquisition of nationality by marriage and by grant of nationality does not, for persons over 15 years of age, become operative before they take an oath of the following wording: "I promise upon my honor and conscience that I shall always be loyal and devoted to the Czechoslovak Republic and its system of a people's democracy and that I shall properly fulfil all obligations of a national thereof."

(2) Only in exceptional instances, may the taking of the oath of allegiance be dispensed with by the Ministry of Interior.

PART TWO

LOSS OF NATIONALITY

Sec. 5

By Marriage

A woman national loses her nationality by marriage to a foreigner, if, pursuant to the legal system of the husband's country, she acquires by marriage the husband's nationality. The National Circuit Committee may, however, upon her application filed either before or not later than six months after the marriage, declare that she retains her nationality. Even in case the application was decided upon affirmatively only after the marriage, the loss of nationality shall be held not to have occurred.

Sec. 6

By Release

(1) Whoever is released from his allegiance to the state, upon his own application, loses his nationality. His nationality ends as of the day of service of the certificate of release.

(2) Spouses may apply for release from nationality in a joint application; the application of each spouse is considered separately. Children under 15 years of age whom their father or mother included in their application, lose their nationality at the same time as their father or mother loses it.

Sec. 7

By Forfeiture

(1) The Ministry of Interior may declare forfeited the nationality of a person who is abroad and

(a) has engaged or engages in any activity hostile to the state or potentially detrimental to its interest; or

(b) illegally left the territory of the Czechoslovak Republic; or

(c) does not return to the country within a decreed period of time, at least within 30 days (from beyond the seas, within 90 days) since the day of service of the demand to return made by the Ministry of Interior.

(2) The Ministry of Interior may also declare forfeited the nationality of a person who has another nationality.

(3) If personal service of the decree of forfeiture of nationality or of a demand pursuant to paragraph (1) (c) be difficult, service by publication may be substituted.

Sec. 8

Family Members

The loss of nationality of one spouse does not affect the nationality of the other spouse or of children, except where this law says otherwise; the same applies where a court has issued a final decree of loss of nationality as a punishment.

PART THREE

JURISDICTION

Sec. 9

(1) In the absence of contrary provisions in this law, the National District Committees decide in matters of nationality. The National District Committee also administers the Oath of Allegiance and certifies for nationals their nationality on a form the wording of which is decreed by the Ministry of Interior. This does not affect the certification of nationality in citizens' identification cards (law of July 19, 1948—Collection No. 198, regarding citizens' identification cards).

(2) The venue is governed by the domicile. If the person has no domestic domicile, the venue is governed by his last domestic domicile; if he had no domestic domicile, or if it be unknown or disputed, the competent National Committee in Prague decides on the nationality of Czechs, and the competent National Committee in Bratislava decides on the nationality of Slovaks, and if the person involved is neither a Czech nor a Slovak, the Ministry of Interior decides on the venue.

PART FOUR

FINAL PROVISIONS

Sec. 10

(1) As of the day when this law becomes effective, the general provisions regarding acquisition and loss of nationality become ineffective.

Specifically repealed are:

(1) the provisions of Sec. 28, second sentence and Secs. 29, 30, 31 and 32, Civil Code;

(2) the Patent on Emigration dated March 24, 1832, No. 2557 of Coll. of Judic. Laws;

(3) the Decrees of the Court Chancellory, regulating matters of nationality;

(4) Law Art. L/1879 regarding acquisition and loss of nationality and Law Art. IV/1886 regarding naturalization of persons repatriated *en masse*;

(5) the provisions of Secs. (2) and (3) of the Law of April 9, 1920, Coll. No. 236, whereby the then operative provisions regarding the acquisition and loss of nationality and legal domicile in the Czechoslovak Republic are supplemented and amended;

(6) the Decree of the Minister of Interior dated December 15, 1926, Coll. No. 225, regarding proof of nationality in the Czechoslovak Republic, as amended by Decree dated July 1, 1928, Coll. No. 108;

(7) the Law of May 29, 1947, Coll. No. 102, regarding acquisition and loss of Czechoslovak nationality by marriage.

(2) This law does not affect: the Law of April 20, 1930, Coll. No. 60, whereby the Agreement dated July 16, 1928, between Czechoslovakia and the United States of North America regarding naturalization is executed; the Law of April 12, 1946, Coll. No. 74, regarding the grant of nationality to repatriated connationals, the Law of September 13, 1946, Coll. No. 179 regarding grant of nationality to connationals from Hungary; and the Law of April 28, 1948, Coll. No. 107, whereby the period for filing applications for grant of nationality to repatriated connationals is extended.

Sec. 11

Detailed provisions for carrying out this Law may be issued by the Minister of Interior by way of regulation.

Sec. 12

This Law becomes operative as of October 1, 1949; the Minister of Interior carries it out in agreement with the members of the Government concerned.

[signed] GOTTWALD

[signed] JOHN

[signed] ZAPOTOCKY

[signed] NOSEK

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THE SOVIET SYSTEM OF COLLECTIVE SECURITY COMPARED WITH THE WESTERN SYSTEM

BY DR. W. W. KULSKI

Professor of Political Science, University of Alabama

Without belittling other functions of the United Nations one must acknowledge that it is hardly capable of taking coercive action in the event of a breach of the peace or of an act of aggression. The United Nations cannot guarantee collective security against aggression, because any permanent member of the Security Council may prevent, by its single veto, the application of sanctions against itself or any other state guilty of aggression. This important gap in the Charter has been filled in by agreements negotiated outside the Organization. The process of negotiating such agreements is not completed, certain areas of the world not being as yet covered by the existing treaties of mutual assistance, but the main lines have already been traced with sufficient clarity.

The Western system is founded for the time being on three regional agreements: the Inter-American Treaty of Reciprocal Assistance of September 2, 1947, the Brussels Five-Power Pact of March 17, 1948, and the Atlantic Pact of April 4, 1949.¹

This system is opposed by the Soviet system which covers Eastern Europe and a great part of the Asiatic mainland. The Western system is based on multilateral agreements, while the Soviet system is formed by a series of bilateral treaties. The Soviet Government seems to see in this bilateral character of the Eastern agreements a notably virtuous feature. When it expressed its severe criticism of the Atlantic Pact in a memorandum of March 31, 1949, which was handed to the Ambassadors of the United States, Great Britain, France, Canada, Belgium, Holland and Luxembourg, it rejected in advance the Western criticism of the Soviet treaties by saying: "All the Soviet Union's treaties of friendship and mutual assistance with the countries of people's democracy have a bilateral character. . . ."² However, when one adds together all the Soviet and satellite bilateral agreements, one finds oneself confronted with an imposing and well-coordinated network which produces the same political and legal effects as one multilateral treaty.

¹ This JOURNAL, Supp., Vol. 43 (1949), pp. 53, 59, 159.

² The text of the Soviet memorandum is translated in the Current Digest of the Soviet Press, 1949, Vol. 1, No. 14, p. 31; also in the U.S.S.R. Information Bulletin, April 8, 1949, pp. 205-206.

The open conflict between the Soviet Union and Yugoslavia created a significant gap in this network. The several agreements concluded by Yugoslavia with the Soviet Union and people's republics of Eastern Europe were unilaterally denounced in October, 1949, by the Soviet Bloc. On the other hand, the Treaty of Mutual Assistance signed on August 14, 1945, by the Soviet Union and the Nationalist Government of China was replaced on February 14, 1950, by a new one, this time signed by the Communist government of the Chinese People's Republic. While the former treaty pledged mutual help only in the event of Japanese aggression, the latter provides for mutual assistance against Japan or any other Power. Thus China joined the Soviet Bloc against the whole outside world.³

The Soviet memorandum was presented to the Western Powers on March 31, 1949. One may test the validity of the arguments advanced against the Atlantic Pact on the background of the Soviet system as it existed at that date. At that time the Soviet Union and her satellites were also fully responsible for their agreements with Yugoslavia, which need not be excluded from the present examination, although they were later denounced.

On March 31, 1949, the Soviet Union was bound by treaties of mutual assistance with the following states: Czechoslovakia (December 12, 1943), Yugoslavia (April 11, 1945), Poland (April 21, 1945), Rumania (February 4, 1948), Hungary (February 18, 1948), Bulgaria (March 18, 1948), and Finland (April 6, 1948). As to the satellites, the following countries were linked *inter se* by similar treaties: Poland-Yugoslavia (March 18, 1946), Czechoslovakia-Yugoslavia (May 9, 1946), Albania-Yugoslavia (July 9, 1946), Czechoslovakia-Poland (March 10, 1947), Bulgaria-Yugoslavia (November 27, 1947), Hungary-Yugoslavia (December 8, 1947), Albania-Bulgaria (December 16, 1947), Rumania-Yugoslavia (December 19, 1947), Bulgaria-Rumania (January 16, 1948), Hungary-Rumania (January 24, 1948), Czechoslovakia-Bulgaria (April 23, 1948), Bulgaria-Poland (May 29, 1948), Hungary-Poland (June 18, 1948), Bulgaria-Hungary (July 16, 1948), Czechoslovakia-Rumania (July 21, 1948), Poland-Rumania (January 26, 1949). The only Eastern European treaty which was concluded after the date of the Soviet memorandum is that between Czechoslovakia

³ The question of other treaties concluded by Nationalist China received attention in the Common Program of the People's Political Consultative Council of China, which is the supreme body of the People's Democratic United Front and, until the convening of the All-Chinese People's Assembly, also the supreme assembly of the Chinese State. Art. 55 of this Program adopted on Oct. 1, 1949, says: "The Central People's Government of the People's Republic of China will study the treaties and agreements concluded between the Kuomintang and foreign governments and, depending upon their content, either will recognize, annul, re-examine or renew them." (Quoted from the text printed by the Current Digest of the Soviet Press, 1949, Vol. 1, No. 41, p. 7.) This article promises an opportunistic policy towards international agreements, but repudiates nevertheless the rule of international law according to which a new government should respect all obligations contracted by preceding governments.

and Hungary, signed on April 16, 1949. With the elimination of the seven Yugoslav treaties which have since been denounced, there remain seventeen treaties covering Eastern Europe to which should be added the two Asiatic treaties: the Soviet-Outer Mongolian treaty of March 12, 1936, and the Soviet-Chinese treaty of February 14, 1950.⁴ It should be noted that the treaties with ex-enemy states were concluded only after the entry into force of the Peace Treaties with Hungary, Bulgaria, Rumania and Finland.

The Soviet memorandum, whose main arguments were reproduced by Minister Vyshinski in his speech on September 23, 1949, at the United Nations General Assembly, had accused the Western Powers of violating the Charter of the United Nations and other international agreements, and of pursuing an aggressive policy through the instrumentality of the Atlantic Pact. It is therefore interesting and legitimate to analyze the Soviet system of mutual assistance and to compare it with the Atlantic Pact in the light of the Soviet arguments advanced against the latter.

The Soviet Government claims that the Atlantic Pact is directed against the Soviet Union and her satellites because none of them was invited to join in it. However, the Soviet Union missed the opportunity of concluding a treaty of mutual assistance with the Western Great Powers. In January, 1945, her government was offered by the United States a four-Power agreement which would also include Great Britain and France; the purpose of the pact was to keep Germany disarmed and to prevent threats to international security. A draft agreement on the same lines was submitted to the Council of Foreign Ministers on April 29, 1946, but the Soviet Government suggested that its consideration be delayed. Because of the Soviet objections the matter was subsequently dropped. Moreover, Article 10 of the Atlantic Pact and Article 9 of the Brussels Pact open both treaties to the accession of third states on the condition of an unanimous invitation by all the contracting parties. None of the Soviet agreements contain any similar clause. Politically neither of the two systems could survive the accessions of states belonging to the rival camp, because such accessions cutting across the present lines of division would spell the end of the existence of the two rival international factions.

The Soviet memorandum saw another proof of the aggressiveness of the Atlantic Pact in its being directed against any third Power. It contrasted this feature of the Atlantic Pact with the Soviet agreements which "are aimed only against the possibility of a repetition of German aggression." This Soviet assertion is not quite accurate. All Soviet agreements

⁴ The English texts of the agreements forming the Soviet European network are to be found in U. S. Department of State, Documents and State Papers, Vol. 1, No. 4 (July, 1948), pp. 227-249, and Vol. 1, Nos. 12 and 13 (March and April, 1949), pp. 681-689 and 727. The English text of the Soviet-Chinese treaty was published in the New York Times, Feb. 15, 1950, p. 11, and the U.S.S.R. Information Bulletin, Vol. X, No. 4 (Feb. 24, 1950), p. 108; see also Supplement to this JOURNAL, p. 84. The Russian text of the same treaty was published in *Pravda*, Feb. 15, 1950.

may be applied against any third state, although seventeen of them pretend by their wording to be directed principally against Germany. Those seventeen treaties do not always use identical terms, but they express the same leading idea of their applicability, at least by implication, against any third Power as well as against Germany. Article 3 of the Soviet-Czechoslovak treaty reads:

Affirming their pre-war policy of peace and mutual assistance, expressed in the treaty signed at Prague on May 16, 1935, the High Contracting Parties, in case one of them in the period after the war should become involved in military action with Germany, which might resume its policy of "*Drang nach Osten*," or with any other State which might join with Germany directly or in any other form in such a war, engage to extend immediately to the other Contracting Party thus involved in military action all manner of military and other support and assistance at its disposal.

This wording does not presuppose necessarily a German armed attack; a policy of Germany which could be interpreted by the two allies as expressing a new *Drang nach Osten* could lead to an armed action of one of the allies against Germany while the other ally would be bound to give its military and other support. Moreover, the military or other action of the two allies might be extended against any third state which could be accused of joining Germany directly or in any other form. The latter terms are of such a nature that they could easily receive a very extensive interpretation. The Soviet-Yugoslav treaty (Article 2) used a very similar though simplified formula:

If one of the contracting parties should in the post-war period be drawn into military operations against Germany, which would have resumed her aggressive policy, or against any other state which would have joined Germany either directly or in any other form in a war of this nature, the other contracting party shall immediately render military or any other support with all the means available.

The Soviet-Polish treaty repeats in its Article 4 almost literally the wording of the Soviet-Yugoslav treaty. Article 3 of the Polish-Yugoslav treaty and of the Czechoslovak-Yugoslav treaty used a slightly different version, while Article 2 of the Polish-Bulgarian treaty introduced a more concise wording:

Should one of the High Contracting Parties become the object of aggression on the part of Germany, or any other country which would unite with Germany directly or in some other form, the other High Contracting Party shall immediately afford the other Party military and other assistance with all the means at its disposal.

Article 3 of the Polish-Czechoslovak treaty inaugurated a modified formula which is also found in other treaties concluded later on:

Should either of the High Contracting Parties become involved in hostilities either with Germany, in consequence of her renewed policy of aggression, or with any other State joining Germany in such a policy, the other High Contracting Party will at once give the High Contracting Party so involved in hostilities all the military and other assistance in its power.

The remaining nine treaties use the same wording with slight variations, except that all of them, beginning with the Soviet-Rumanian treaty, make even easier a joint action against third Powers by adding the all-embracing terms "directly or in any other way," after mentioning the possibility of a third Power joining with Germany in an aggressive policy. For instance, Article 2 of the Czechoslovak-Hungarian treaty which is typical for these nine treaties defines the *casus foederis* in the following manner:

Should either of the High Contracting Parties become involved in hostilities with a Germany trying to revive her aggressive policy or with any other country joining Germany's aggressive policy directly or in any other way, the other High Contracting Party will without delay and by every available means render military and all other assistance to the Contracting Party attacked.⁵

The Soviet-Finnish treaty pledges both parties to take joint action not only against Germany, but also against any third Power allied with her, but in this case the *casus foederis* is restricted, Finland being required only to exercise her right of self-defense. Article 1, paragraph 1, defines the obligation of Finland in the following manner:

In the event of Finland or the Soviet Union, across the territory of Finland, becoming the object of military aggression on the part of Germany or any State allied to the latter, Finland, loyal to her duty as an independent State, will fight to repulse the aggression. In doing so, Finland will direct all the forces at her disposal to the defense of the inviolability of her territory on land, on sea and in the air, acting within her boundaries in accordance with her obligations under the present Treaty, with the assistance, in case of need, of the Soviet Union or jointly with the latter.

As an attack against the Soviet Union across the Finnish territory would be by implication an attack against Finland herself, the treaty asks Finland only to defend herself within her own boundaries. However, Finland is not left entirely free to decide whether a case for her self-defense would have arisen. Article 2 of the treaty adds: "The High Contracting Parties will consult each other in the event of a threat of military attack envisaged in Article 1 being ascertained." However, Finland reserved the right to

⁵ The nine treaties following the formula of the Polish-Czechoslovak treaty with the addition of terms "directly or in any other way" are as follows: the Soviet-Rumanian, the Soviet-Hungarian, the Soviet-Bulgarian, the Polish-Hungarian, the Rumanian-Czechoslovak, the Polish-Rumanian, the Czechoslovak-Hungarian (Art. 2); the Czechoslovak-Bulgarian and the Hungarian-Bulgarian (Art. 3).

assent in each case to Soviet assistance being extended to her; the second paragraph of Article 1 specifies: "In the cases indicated above, the Soviet Union will render Finland the necessary assistance, in regard to the granting of which the parties will agree between themselves." The terms of the treaty seem to reflect one of the considerations of its preamble: "... considering Finland's aspiration to stand aside from the contradictions of interests of the Great Powers. . . ." Unlike the other satellites, Finland seems to be free to remain neutral in case of a war involving the Soviet Union, provided the other belligerents respect her territory. The treaty points to the privileged position which Finland continues to enjoy also in other respects.

Setting aside the Soviet-Finnish treaty which forms a distinct category in itself, the remaining sixteen treaties are directed not only against Germany, but also against other Powers. Most of them (ten) are applicable against a third state in the event of the latter joining Germany in a renewed policy of aggression. The scope of those treaties depends on the interpretation which the Soviet Bloc might give to those flexible terms: "to join Germany's aggressive policy directly or in any other way." Those terms might cover any act of a third Power which would be interpreted by the Soviet Bloc as a proof of sponsoring an aggressive policy of Germany. The flexibility of such a formula of *casus foederis* in regard to states other than Germany must have been fully realized by those who inserted it in those ten treaties, while six other treaties had used a much more restrictive formula. In the latter treaties the obligation of mutual assistance arises only if a third Power should join Germany in a war or in an aggression against one of the signatories.⁶

If any third state should be the object of the armed action of the Soviet Bloc because it is held responsible for joining Germany in an aggressive policy, although such a state might not have committed any act of armed aggression, the implications of the *casus foederis* are truly far-reaching. The anti-Western meaning of such formulas cannot escape attention when it is realized that the Soviet Union and her satellites for the last few years have been accusing the Western Powers of sponsoring the regeneration of an aggressive Germany in their zones of occupation. It may be illustrated by a few pertinent quotations from the joint declaration adopted on June 24, 1948, by a conference representing the governments of the Soviet Union, Albania, Bulgaria, Czechoslovakia, Yugoslavia, Poland, Rumania and Hungary:

⁶ The six treaties using a more restricted formula are: the Soviet-Czechoslovak, the Soviet-Yugoslav, the Soviet-Polish, the Polish-Yugoslav, the Czechoslovak-Yugoslav and the Polish-Bulgarian. The ten with the flexible formula are: the Polish-Czechoslovak, the Soviet-Rumanian, the Soviet-Hungarian, the Soviet-Bulgarian, the Czechoslovak-Bulgarian, the Polish-Hungarian, the Hungarian-Bulgarian, the Rumanian-Czechoslovak, the Polish-Rumanian and the Czechoslovak-Hungarian.

The London decisions (i.e., the decisions of the American-British-French conference held in London in June, 1948) aim not at the prevention of the possibility of a new German aggression, but at the transformation of the western part of Germany and primarily of the heavy industries of the Ruhr into a tool for the re-establishment of the war potential of Germany, in order to use this potential in accordance with the military and strategic objectives of the U. S. and Great Britain. One understands that such a plan cannot but produce conditions favorable to a repetition of German aggression. . . . the campaign of the German revisionist elements is directed principally against the Polish-German frontier as established on the Oder and the Western Neisse, this frontier being an indestructible frontier, the frontier of peace. The London Conference fails to mention the question of the revisionist campaign, thus encouraging the aggressive tendencies of German reactionary circles. In these circumstances the application of measures against any revisionist activity appears to be one of the principal conditions for consolidation of the peace and security of the peoples of Europe.⁷

At the present time the Soviet Union is watching closely the question of Western German participation in the Council of Europe, and its press is alleging that the Western German State will be ultimately included in the Atlantic Pact. If Western Germany should become some day a partner in the Atlantic Pact, or if she should be allowed to establish her own armed forces, the Soviet Union would claim with even a greater vigor that the Western Powers are joining in the aggressive policy of Germany.

While the seventeen agreements which have been referred to may be applied against any Power which would become allegedly an accomplice of Germany, seven other treaties openly stipulate the obligation of mutual assistance against any Power independently of the latter's policy towards Germany. Five of them use the formula which we reproduce according to Article 3 of the Rumanian-Hungarian treaty:

In the event that Germany or a third State shall commit an aggression against one of the High Contracting Parties, with a view to threatening it independence, subjugating it or to infringing its territorial integrity, the other High Contracting Party shall without delay give to the attacked High Contracting Party military assistance or assistance of any other nature by all the means at its disposal.⁸

⁷ Quoted according to the French text published by the French Ministry of Foreign Affairs in *Notes Documentaires et Etudes*, No. 962, *Textes Diplomatiques*, LVI, pp. 4-5.

⁸ The wording of Art. 3 of the Rumanian-Hungarian treaty is reproduced in Art. 3 of the treaties between Yugoslavia and Hungary, Albania and Bulgaria, and Rumania and Bulgaria. The fifth treaty of the same class, namely the Yugoslav-Rumanian, expressed the same idea in a different manner: "Should one of the High Contracting Parties be drawn into hostilities with Germany, as the result of a revival of the latter's aggressive policy, or should it be attacked by a third state or several states with the aim of threatening its independence, enslaving it or taking away its territory, the other High Contracting Party will without delay lend it military and every other assistance by all available means." (Art. 3.)

Aggression by any third Power would be a sufficient reason in itself for the application of those five treaties, although such an aggression might have nothing to do with Germany. The two treaties now denounced, those concluded by Yugoslavia with Albania and Bulgaria, used a different formula which did not mention Germany at all, and which was expressed in the following terms of Article 3 of the Bulgarian treaty:

In the event of an attack against one of the contracting parties by a third nation imperiling its independence, threatening to enslave it or to annex part of its territory, the other contracting party will immediately come to its assistance with all possible military and other aid.⁹

There is a striking difference between the wording of the *casus foederis* in the Eastern European agreements and in the treaties concluded by the Soviet Union with Great Britain and France. The latter two treaties expressed the war-time solidarity of the Allies, while the Eastern European agreements, like the Atlantic Pact, reflect the disappearance of that solidarity. While the Eastern European agreements are directed against any third Power, be it an ex-allied state, the Soviet-British and the Soviet-French treaties were careful to limit the obligation of mutual assistance to an action against enemy states. The British-Soviet treaty of May 26, 1942,¹⁰ provides for the event of an attack by Germany or any other state which was associated with her during the last war. The French-Soviet treaty of December 10, 1944,¹¹ limits the obligation of mutual assistance to the case of German aggression only. The new wording refusing preferential treatment to the allied nations was introduced for the first time in the Soviet-Czechoslovak treaty of December 12, 1943,¹² and has been reproduced since in other Soviet agreements.

The Brussels and Atlantic Pacts restrict the *casus foederis* to the event of an armed attack by a third Power against any of the contracting parties; they use the very terms of Article 51 of the United Nations Charter.¹³ The Eastern European agreements do not conform to this terminology. Three of them use the term "war," which might be considered in this con-

⁹ Art. 3 of the Albanian-Yugoslav treaty was worded almost identically.

¹⁰ See this JOURNAL, Supp., Vol. 36 (1942), p. 216.

¹¹ *Ibid.*, Vol. 39 (1945), p. 83.

¹² *Ibid.*, p. 81.

¹³ Art. 51 of the Charter: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

text as a synonym for an armed attack,¹⁴ five refer to "aggression,"¹⁵ six to "attack,"¹⁶ and ten to "an aggressive policy" and joining with such a policy.¹⁷ Not only an allegedly aggressive policy, but even an attack or an aggression without the qualifying term "armed," might mean something very different from the armed attack as conceived by Article 51 of the Charter. Unfriendly diplomatic or economic pressure by a third Power might be called an attack, an aggression or an aggressive policy, and might open the way to the application of the Soviet agreements. Moreover, an actual armed attack by the Soviet Union or one of her satellites might be presented within the terms of those agreements as an action of self-defense against a third Power because of the latter's supposed attack or aggression of non-military nature or alleged association with a German aggressive policy. However, such a wide meaning of the right of self-defense could not be justified by Article 51, which clearly restricts self-defense to a counter-action against an armed attack which has actually taken place. A different interpretation of Article 51 would open the way to preventive wars and to recourse to war as an instrument of national policy.

None of the Soviet agreements contains a reservation similar to that of Article 5 of the Atlantic Pact or Article 5 of the Brussels Pact, namely, that all measures of mutual assistance which may be taken by the contracting parties shall be immediately reported to the Security Council and shall be terminated when the Security Council itself proceeds to order measures necessary for the restoration of peace and international security. Such a reservation is imposed on Members of the United Nations by the very terms of Article 51, while the Soviet agreements pledge their signatories to grant each other an unconditional assistance without any reference to the controlling powers of the Security Council.

The only coercive action which escapes control by the Security Council would be an action carried out against enemy states. Such action is exempt from the control of the Security Council by Articles 53 and 107 of

¹⁴ Art. 3 of the Soviet-Czechoslovak treaty, Art. 2 of the Soviet-Yugoslav treaty and Art. 4 of the Soviet-Polish treaty.

¹⁵ Art. 1 of the Soviet-Finnish treaty, Art. 3 of the Polish-Yugoslav treaty, Art. 3 of the Rumanian-Bulgarian treaty, which uses the term "an act of aggression," Art. 3 of the Rumanian-Hungarian treaty and Art. 2 of the Polish-Bulgarian treaty.

¹⁶ Art. 3 of the Czechoslovak-Yugoslav treaty, the Albanian-Yugoslav treaty, the Yugoslav-Bulgarian treaty, the Yugoslav-Hungarian treaty, the Albanian-Bulgarian treaty and the Yugoslav-Rumanian treaty.

¹⁷ Art. 2 of the Soviet-Rumanian and the Soviet-Bulgarian treaties, Art. 3 of the Czechoslovak-Polish, the Bulgarian-Hungarian, and the Czechoslovak-Bulgarian treaties, Art. 2 of the Polish-Hungarian, the Czechoslovak-Rumanian, the Polish-Rumanian and the Czechoslovak-Hungarian treaties, and Art. 2 of the Soviet-Hungarian treaty which defines the *casus foederis* in a confusing manner, using simultaneously the terms "aggressive policy," "aggression," "war" and "offensive."

the Charter.¹⁸ Insofar, however, as the Soviet agreements apply to states other than Germany, the exemption of those articles is inoperative.

While the former Soviet-Chinese treaty of 1945¹⁹ restricted the *casus foederis* to the event of an attack directed by Japan against one of the parties and followed the pattern of the Soviet-French treaty, the present treaty of 1950 stipulates:

The High Contracting Parties engage that they shall undertake jointly all necessary measures at their disposal to prevent any repetition of aggression and violation of peace on the part of Japan or any other state which directly or indirectly would unite with Japan in acts of aggression. In the event of one of the contracting parties being subjected to attack by Japan or any state allied with her, thus finding itself in a state of war, the other High Contracting Party shall immediately render military and other aid with all means at its disposal. (Article 1.)

The Chinese People's Republic is bound like the Eastern European countries to assist the Soviet Union in the case of an attack by any third Power allegedly allied with Japan.

The Soviet Government went so far in its criticism of the Atlantic Pact as to deny to Members of the United Nations the right to conclude in advance arrangements for collective self-defense. The Soviet memorandum stated it in the following terms:

Nor can the establishment of the North Atlantic group of states be justified by the right of every member of the United Nations to individual or collective self-defense in accordance with Article 51 of the Charter. Suffice it to say that such a right, in accordance with the United Nations Charter, can only arise in the event of an armed attack on a member of the organization, while, as is universally known, neither the U. S. A. nor Great Britain nor France nor the other participants in the pact are threatened with any armed aggression.

¹⁸ Article 53 of the Charter: "1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

"2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter."

Article 107 of the Charter: "Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action."

¹⁹ This JOURNAL, Supp., Vol. 40 (1946), p. 51.

This argument confuses three aspects of Article 51. One is the right of self-defense which is inherent, according to Article 51, and cannot, therefore, "arise" in the case of an armed attack because it already exists and is vested permanently in all states. The other aspect is the exercise of this right; the Soviet Government would be correct in saying that the exercise of the right of self-defense may take place only in the event of an armed attack. But there is a third aspect: Article 51 does not define the conditions of the exercise of the collective right of self-defense. The latter means the right of every Member to consider an armed attack against another Member as being equivalent to an attack against itself and to take any measures required to repel such attack. Article 51 leaves entirely to the good faith of Members the question of determining in each case whether an attack directed against another Member would involve such a clear threat to their own existence that they would be entitled in their own judgment to use any means, including force, in the collective defense of the victim of aggression. This being so, they may declare in advance in an international agreement concluded between two or several states that an attack against one of the signatories would be considered as an attack against all of them. Such an agreement clarifies to some extent the intentions of the signatories in regard to their collective right of self-defense without depriving them of their inherent right of taking action in the event of an armed attack directed against a non-signatory. The general applicability of Article 51 to all cases of armed attack is not restricted by special agreements, which only make certain that the contracting parties will apply Article 51 in the circumstances stated hypothetically in those agreements.

Common sense indicates that Members of the United Nations cannot be forbidden to take necessary precautions to safeguard, in case of necessity, their own security which the Organization is patently unable to protect. Those measures may be of two kinds: national—relating to the development of the potential of national defense; and international—in the form of agreements of mutual assistance. The Soviet Government has never denied the right of Members to take in advance measures of national precaution, for instance, to arm as they please as long as there is no international regulation of armaments. It is hardly logical to deny to Members the right also to take international measures of precaution, namely, to conclude arrangements of mutual assistance. Moreover, the San Francisco Conference considered that Article 51 fully safeguarded the co-existence of regional and other defensive arrangements with the Charter. This interpretation appeared in particular the fears of the Latin American Republics.

One may wonder how the Soviet Government is able to reconcile such a restrictive interpretation of Article 51 with the existence of treaties of mutual assistance concluded under Soviet auspices. The Soviet memorandum replied to the question: "All the Soviet Union's treaties of friendship and mutual assistance with the people's democracies . . . are

aimed only against the possibility of a repetition of German aggression." In other words, the Soviet Government claims the benefit of Article 53, paragraph 1, of the Charter for the agreements forming its own system of security. This provision exempts from the control of the Security Council the application of such regional agreements which are directed against the renewal of an aggressive policy on the part of enemy states. Freedom of action conceded by Article 53 is greater than that allowed by Article 51, because an action may be taken against an enemy state even in the absence of any armed attack on the part of that state. Article 107 of the Charter, which was not mentioned in the Soviet memorandum, extends further this latitude of action conceded by the Charter to Members when the latter are dealing with enemy states. Notwithstanding the prohibition of the use of force as formulated in Article 2, paragraph 4, of the Charter, Members of the United Nations have retained by virtue of Articles 53 and 107 the right of taking any appropriate action to prevent the renewal of an aggressive policy on the part of enemy states.²⁰ Those two articles would have vindicated the Soviet agreements, if the latter were directed exclusively against enemy states. In fact, they vindicate only the Soviet agreements with Great Britain and France because those agreements are applicable only against enemy states. All other agreements of the Soviet system are not covered by Articles 53 and 107, because all of them are applicable not only against enemy states (Germany in the case of Eastern European treaties, or Japan in the case of the Soviet-Chinese treaty), but also against any third Power.

Although the Soviet Government denies that the Atlantic Pact could be concluded by virtue of Article 51, this Pact and the Soviet agreements of mutual assistance could not be justified otherwise than by a reference to that article of the Charter. The Soviet memorandum goes further, claiming that the Atlantic Pact is not a regional arrangement which could be concluded in accordance with Article 52 of the Charter.²¹ It states:

²⁰ Art. 2, par. 4, of the U. N. Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

²¹ Article 52 of the Charter: "1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

"2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council."

"3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council."

"4. This Article in no way impairs the application of Articles 34 and 35."

There can be no question of any regional nature of this treaty, since the alliance envisaged by it embraces states in both Hemispheres of the world and does not have the purpose of settling any regional questions. This is also confirmed by the fact that, as has already been announced, states which are not members of the United Nations (Italy, Portugal) are being drawn into participation in the North Atlantic Treaty, although Article 52 of the U. N. Charter envisages only the conclusion of regional agreements among members of the United Nations.

One may immediately observe that there is no word in the whole Article 52 which would restrict regional arrangements to Members of the United Nations. If any doubt of interpretation may exist, it would concern Article 51, which seems to restrict the right of collective self-defense to an armed attack occurring "against a Member of the United Nations." However, if the right of self-defense is declared to be inherent, and therefore as existing independently of all provisions of the Charter, does it not include implicitly the right of Members to consider an armed attack against a non-member as an attack against themselves? This interpretation would be supported by Article 2, paragraph 4, which makes illegitimate the use of force against all states, Members or non-members. But whatever might be the theoretical speculations concerning this aspect of Article 51, Members themselves have already given in practice their own interpretation. Both the Western Powers and the Soviet Union and her satellites have concluded agreements of mutual assistance with non-members. The Soviet argument advanced against the Italian and Portuguese participation in the Atlantic Pact sounds false when one recalls the treaties of mutual assistance concluded by the Soviet Union, Poland, Czechoslovakia and Yugoslavia, all Members of the United Nations, with such non-members as Outer Mongolia, Finland, Hungary, Rumania, Bulgaria and Albania.

The Soviet objections relating to the incompatibility of the Atlantic Pact with the provisions of the United Nations Charter may be met in one of two ways: either by refusing to consider that Pact as a regional arrangement or by proving that the Atlantic Pact, though being a regional agreement in the sense of Article 52 of the Charter, has not infringed upon the pertinent provisions of the Charter. The American and British Governments took the first position. Both Secretary of State Dean Acheson and Foreign Secretary Bevin made statements in this sense.²² Yet there seems to be a lack of unanimity among the signatories of the Pact as to this aspect of its nature. The Ambassador of The Netherlands, one of the signatory states, considers the Pact as a regional agreement:

²² "The North Atlantic Treaty in the United States Senate," by Richard H. Heindel, Thorsten V. Kalijarvi, and Francis O. Wilcox, this JOURNAL, Vol. 43 (1949), at pp. 638-639.

In the light of these observations and of this definition it may be said that no reasons of either logic or precedent stand in the way of attributing to the North Atlantic Treaty the character of a regional arrangement, a conclusion which, as we shall see, is of great importance with regard to the question of the relationship between that Treaty and the Charter of the United Nations.²³

When choosing between these two interpretations one cannot be guided exclusively by the intentions or statements of the signatories. The nature of a treaty is defined by its content. Therefore the Atlantic Pact may be considered as a regional arrangement or not, depending on the definition of such arrangements. The Soviet arguments cannot be adequately met without giving first of all such a definition.

The Soviet memorandum raises the question: What area may be considered as a region in the sense of Article 52? The Charter does not provide any answer. The Soviet Government advances by implication a theory of land mass. According to the Soviet memorandum any area which oversteps an ocean or includes parts of both hemispheres could not be treated as a region in the sense of Article 52. Such a theory is very convenient for the Soviet Union whose expansion follows, for geographical reasons, the lines of land communications; but it cannot withstand any impartial examination. If an international region should be located within one hemisphere, why should it not be limited to one part of the world? Yet the Soviet system extends over large parts of Europe and Asia. Moreover, the political and economic interests of states could not be compressed within the boundaries of a hemisphere, a part of the world, or within one land mass not divided by any sea or ocean. Two countries located in two different hemispheres or separated by the vast expansion of an ocean might have nevertheless more in common than each of them in relation to states situated within the same hemisphere or on the same continent. Geographical location does not create by itself a solidarity of interests, nor do land communications create by themselves a greater community of interests than the maritime. One cannot see any valid reasons why the United States and Canada, which are politically and economically linked to the Western European countries by the Atlantic Ocean, should be precluded by this fact from forming one political region with those states. A theory of one hemisphere or land mass would, of course, eliminate the United States from the Eastern Hemisphere and force it to return to a 19th-century isolationism. This was probably the only reason why the Soviet memorandum proposed such a strange theory. (A regional arrangement in the sense of Article 52 of the Charter seems to be any arrangement achieved by several states, through bilateral or multilateral agreements, concerning the maintenance of international

²³ "Regionalism and Political Pacts, with Special Reference to the North Atlantic Treaty," by E. N. van Kleffens, Ambassador of The Netherlands, in this JOURNAL, Vol. 43 (1949), at p. 669.

peace and security within a definite geographical area (region). When several states consider that they have a joint interest in the maintenance of international peace in a definite area, they form potentially a region and are free to conclude special arrangements by virtue of Article 52. The Soviet agreements and the Atlantic Pact are both regional arrangements, though each of them covers an area different from the other by its geographical nature.

The Soviet memorandum states further:

No one can deny that the North Atlantic Treaty, and, above all, Article 5 of it, is directly contrary to the United Nations Charter. In the text of Article 53 which deals with enforcement action under regional agreements, it is directly stated that "no enforcement action shall be taken as a result of these regional agreements or by regional agencies without the authorisation of the Security Council," with the exception of steps especially envisaged regarding the former hostile states. Despite this, Article 5 of the North Atlantic Treaty provides for the use of armed force by participants in the treaty without any authorisation from the Security Council. Thus, even if the North Atlantic Treaty is considered a regional agreement, Article 5 of this treaty is incompatible with the United Nations Charter.

If this interpretation of Article 53 of the Charter were correct, it would apply as well to the Soviet system of mutual assistance, the Soviet agreements containing no provision safeguarding the rights of the Security Council. The Soviet interpretation, however, does not seem to be exact.

No article of any international treaty may be interpreted in isolation from the other articles of the same instrument. Article 53 of the Charter should be read in conjunction with Article 51 which declares: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations. . . ." This categorical statement applies to all provisions of the Charter, including Article 53. Article 53 could not cripple the right of collective self-defense, declared to be inherent by Article 51. This being so, regional arrangements of collective self-defense may be applied immediately in the event of an armed attack, without waiting for the authorization of the Security Council.

The question arises whether Article 51 has not deprived Article 53 of all meaning. This would be so, if the action of mutual assistance in accordance with Article 51 were the only enforcement action known to the Charter. But the Charter foresees other enforcement actions as well. For instance, Chapter VII would authorize the Security Council to apply collective sanctions even in the absence of any armed attack. In the event of a threat to the peace the Security Council may order provisional measures, like the demobilization of armed forces by the parties to a dispute, or the withdrawal of troops at a distance from the frontier. If one of the parties should refuse to comply with such provisional measures,

the Security Council would be entitled to order enforcement action against such a party. Such enforcement action would take place in a situation altogether different from that which is envisaged by Article 51. Parties to a regional arrangement would be forbidden by Article 53 to take such enforcement action without previous authorization of the Security Council.

Article 94, paragraph 2, of the Charter gives large powers to the Security Council concerning the enforcement of judgments of the International Court of Justice.²⁴ The Council could order an enforcement action against a recalcitrant party refusing to abide by a judgment of the Court. Again, this kind of enforcement action could not be taken by the parties to a regional arrangement without the consent of the Security Council. These two examples prove that the Charter foresees enforcement actions in such situations which are not covered by Article 51. Therefore, Article 53 may be reasonably interpreted as meaning that the regional groups are not empowered to take any enforcement action without the consent of the Security Council, except in the case of an armed attack directed against a member of the group, this case being covered by the overriding provision of Article 51.

The Soviet memorandum of March 31, 1949, accused Great Britain and France of violating their respective treaties of mutual assistance concluded with the Soviet Union. The Atlantic Pact, alleged the memorandum, "is contrary to the 1942 treaty between Great Britain and the Soviet Union, under which both states undertook obligations to coöperate in maintaining peace and international security and 'not to conclude any alliances nor to take part in any coalition directed against the other High Contracting Party.' " The memorandum repeated the same charge against France.²⁵ It is true that both countries undertook such obligations by Article VII of the Soviet-British treaty and Article V of the Soviet-French treaty, respectively. The same provision has also been reproduced in all agreements of the Soviet system. The British-Soviet formula was repeated in the Soviet agreements with Czechoslovakia, Poland, Yugoslavia, and Finland, and in the Czechoslovak-Yugoslav, Yugoslav-Albanian and Czechoslovak-Polish treaties.²⁶ Other Soviet agreements employ a different wording of a wider significance. We find this new wording for the first time in the Polish-Yugoslav treaty: "Each of the High Contracting Parties

²⁴ Art. 94, par. 2, of the Charter: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

²⁵ Art. VII of the Soviet-British treaty: "Each High Contracting Party undertakes not to conclude any alliance and not to take part in any coalition directed against the other High Contracting Party." Art. V of the Soviet-French treaty reproduces identical wording.

²⁶ Art. 5 of the Soviet-Czechoslovak treaty, Art. 4 of the Soviet-Yugoslav, Czechoslovak-Yugoslav, Yugoslav-Albanian, Czechoslovak-Polish, and Soviet-Finnish treaties, and Art. 6 of the Soviet-Polish treaty.

agrees to refrain from concluding any alliance and from taking part in any action directed against the other High Contracting Party." (Article 1.) While the former formula could be interpreted as forbidding the participation in hostile treaties of mutual assistance or hostile organized collective actions termed "coalitions," the new formula seems to aim at prohibiting the participation not only in unfriendly actions resulting from a treaty of alliance or from the existence of an organized coalition, but also in actions directed against one of the parties in order to bring pressure to bear on it in one individual case, such action being undertaken *ad hoc* by several states otherwise not bound by any alliance or coalition. This new wording was reproduced in twelve other treaties.²⁷ The five remaining treaties use a variation of the same formula, which was introduced for the first time in the Soviet-Rumanian treaty of February 4, 1948: "Each of the High Contracting Parties undertakes to conclude no alliance and to participate in no coalition, action or measures directed against the other High Contracting Party." (Article 3.)²⁸ The initial formula is to be found again in Article IV of the Soviet-Finnish treaty, although it is one of the latest in date.

Is the Soviet Government right in claiming that such obligations would prevent a contracting party from participating in any coercive action directed against the other party? Article 103 of the Charter gives an appropriate answer: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." The Soviet agreements with Britain, France and other countries must be interpreted in the light of this overriding provision. Therefore, the obligation not to participate in hostile alliances and coalitions is subject first of all to one exception, namely, taking part in an enforcement action in accordance with the decisions of the Security Council. But assuming that the Security Council would be immobilized, in the event of an illegitimate use of force by the Soviet Union, because of the veto of one of its permanent members, should the provision concerning non-participation in hostile coalitions be interpreted in the sense of an obligation of Britain and France to remain inactive and to condone an aggression only because committed by the Soviet Union? This interpretation would contradict indirectly Article 2 of the Charter, which condemns the use of force in any manner inconsistent

²⁷ Art. 3 of the Soviet-Hungarian, Polish-Bulgarian, Polish-Hungarian, and Polish-Rumanian treaties, and Art. 4 of the Yugoslav-Bulgarian, Yugoslav-Hungarian, Albanian-Bulgarian, Yugoslav-Rumanian, Rumanian-Bulgarian, Rumanian-Hungarian, Czechoslovak-Hungarian and Rumanian-Czechoslovak treaties.

²⁸ One finds practically the same wording in Art. 3 of the Soviet-Bulgarian and Soviet-Chinese treaties, and Art. 4 of the Czechoslovak-Bulgarian and Bulgarian-Hungarian treaties.

with the purposes of the Charter and requires Members to act in accordance with those purposes. Moreover, an illegitimate use of force may constitute an armed attack against a state. France and Britain then would be authorized to act in the exercise of their collective right of self-defense and to assist the victim of a Soviet aggression. The Soviet Union recognized by her signature of the Charter that France, Britain and other Members of the United Nations had an inherent right of collective self-defense. This right, being inherent, must be presumed to be reserved implicitly in any international agreement, including the Soviet-British and the Soviet-French agreements, notwithstanding the clause concerning non-participation in hostile coalitions.

The agreements of the Soviet system invite themselves to be interpreted in accordance with the Charter. Almost all of them contain provisions safeguarding the principles of the Charter; those provisions correspond to Article 7 of the Atlantic Pact and Article 5 of the Brussels Pact. The early exception is provided by the Soviet-Czechoslovak treaty, probably because it was concluded in 1943, some eighteen months before the signature of the Charter. But the treaty next in date—between the U.S.S.R. and Yugoslavia—although signed on April 11, 1945, two weeks before the opening of the San Francisco Conference, contained nevertheless such a paragraph in Article 3: "The High Contracting Parties state that the application of the present treaty will be in accordance with the international principles in the acceptance of which they have participated." This was a clear reference to the principles of the organization which was envisaged at that time and was to become the United Nations. A similar provision appeared in the Soviet-Polish treaty of April 21, 1945 (Article 3, paragraph 3). Since the adoption of the Charter the Soviet treaties introduced a formula referring directly to the Principles of the Charter as overriding the particular obligations contained in those treaties. For instance, Article 2, paragraph 3, of the Polish-Czechoslovak treaty states: "The High Contracting Parties will honor their obligations devolving upon them as Members of the United Nations Organization in the execution of the present treaty."²⁹ Similar provisions figure in other agreements, even in those which have been concluded with non-members. Article 7 of the Soviet-Finnish treaty declares, for instance: "Implementation of the present treaty will conform to the principles of the United Nations Organization."³⁰ A similarly worded

²⁹ Similar provisions are inserted in other treaties concluded between United Nations Members: Art. 4 of the Polish-Yugoslav, and Art. 2 of the Czechoslovak-Yugoslav treaties.

³⁰ Similar provisions are to be found in the following treaties concluded by the Soviet Union, Poland, Czechoslovakia and Yugoslavia with non-members which belong to the Soviet Bloc: Art. 2 of the Soviet-Rumanian, Soviet-Bulgarian, Soviet-Hungarian, Albanian-Yugoslav, Rumanian-Polish, and Bulgarian-Czechoslovak treaties, Art. 7 of the

provision is to be found even in the treaties concluded between two satellites, both of them non-members. Article 6 of the Rumanian-Hungarian treaty is typical in this respect: "... the High Contracting Parties shall implement this Agreement in the spirit of the United Nations Charter and shall give their support to all actions tending to do away with any breeding-ground of aggression and to ensure the maintenance of the peace and the security of the world."³¹

It is impossible to find any adequate explanation of the omission of this clause securing the implementation of the Soviet treaties in accordance with the United Nations Charter in three of them: the Hungarian-Czechoslovak, the Soviet-Chinese and the Bulgarian-Hungarian, especially as the first treaty was concluded by a Member of the United Nations and the second is an agreement between two Members. It is, however, interesting to note that the Hungarian-Czechoslovak treaty is the last in date among the European treaties of the Soviet system, having been signed on April 16, 1949, while the Soviet-Chinese treaty is even more recent, its date of signature being February 14, 1950. The omission in both of the otherwise usual clause cannot be interpreted as an expression of a new, less sympathetic attitude towards the United Nations, because both treaties contain a reference to that Organization. Article 1 of the Hungarian-Czechoslovak treaty contains two such sentences: "... For this reason they will participate in every international action aimed at defending and maintaining international security and peace. They will effectively contribute to the realization of this aim in accordance with the Principles of the United Nations." A similarly worded paragraph is included in the preamble of the Soviet-Chinese treaty, which does not mention the United Nations anywhere else. However, this brief reference cannot be considered as being equivalent to a provision obligating the parties to execute their bilateral treaty in accordance with the Charter. The Hungarian-Bulgarian treaty is the only one which does not even mention the name of the United Nations.

Ten treaties concluded between the satellite countries contain provisions safeguarding the obligations contracted by the parties towards third states. The usual wording is that of Article 7 of the Bulgarian-Hungarian treaty: "The provisions of the present treaty shall not in any way affect the contractual obligations of either of the High Contracting Parties towards a third state."³² For no apparent reason this clause

Bulgarian-Yugoslav treaty, and Art. 6 of the Hungarian-Yugoslav, Rumanian-Yugoslav, Bulgarian-Polish, Hungarian-Polish, and Rumanian-Czechoslovak treaties.

³¹ Similar provisions are contained in Art. 7 of the Bulgarian-Albanian and Rumanian-Bulgarian treaties.

³² The provisions corresponding to Art. 7 of the Bulgarian-Hungarian treaty are as follows: Art. 4 of the Polish-Yugoslav treaty, Art. 7 of the Bulgarian-Yugoslav, Albanian-Bulgarian and Rumanian-Bulgarian treaties, and Art. 6 of the Rumanian-Hungarian,

is absent from seven other treaties concluded by the satellites *inter se*.²³ There is no such provision in any treaty concluded by the Soviet Union herself; this might point to a Soviet assumption that the obligations of the people's republics towards the U.S.S.R. should override their engagements towards any other state.

The obligation of mutual assistance is the core of the whole system, but the treaties have been conceived as being a formal foundation of the Soviet political constellation. They include, therefore, solemn pledges of general coöperation. The pertinent provisions have been drafted in various terms, probably depending on the respective situations of the signatories. The model clause appears in Article 4 of the Soviet-Czechoslovak treaty:

The High Contracting Parties, having regard to the security interests of each of them, agree to close and friendly coöperation in the period after the restoration of peace and agree to act in accordance with the principles of mutual respect for their independence and sovereignty, as well as of non-interference in the internal affairs of the other State. They agree to develop their economic relations to the fullest possible extent and to extend to each other all possible economic assistance after the war.

The obligation of non-interference in domestic affairs figures also in all other treaties concluded by the Soviet Union with the people's republics, except—a strange coincidence—in the Soviet-Yugoslav treaty.²⁴ Needless to add, this clause is rather meaningless. The treaties concluded by the satellites *inter se* do not mention the question of non-interference in each other's internal affairs.

The Soviet-Polish treaty contains some variations on the same theme of mutual coöperation. Its Article 2 states:

The High Contracting Parties, in a firm belief that in the interest of security and successful development of the Polish and Soviet peoples it is necessary to preserve and to strengthen lasting and unshaken friendship during the war as well as after the war, will strengthen the friendly coöperation between the two countries in accordance with the principles of mutual respect for their independence and sovereignty and non-interference in the internal affairs of the other government.

Yugoslav-Rumanian, Hungarian-Yugoslav, Polish-Bulgarian and Rumanian-Czechoslovak treaties.

²³ These treaties are: the Czechoslovak-Yugoslav, the Albanian-Yugoslav, the Polish-Czechoslovak, the Czechoslovak-Bulgarian, the Polish-Hungarian, the Polish-Rumanian and the Czechoslovak-Hungarian.

²⁴ Art. 2 of the Soviet-Polish treaty, Art. 5 of the Soviet-Rumanian, Soviet-Hungarian, and Soviet-Bulgarian treaties, and Art. 6 of the Soviet-Finnish treaty. Also the Soviet-Chinese treaty contains the obligation mutually to respect the sovereignty and territorial integrity of the other contracting party, and not to interfere in the internal affairs of that party (Article 5).

Article 7 contains the pledge of economic and cultural collaboration: "The High Contracting Parties will coöperate in a spirit of friendship also after the end of the present war for the purpose of developing and strengthening the economic and cultural relations between the two countries and will give mutual assistance in the economic reconstruction of the two countries." Those two articles are completed by a special pledge of concerted policy towards Germany:

The High Contracting Parties further undertake that even after the end of the present war they will jointly use all the means at their disposal in order to eliminate every possible menace of a new aggression on the part of Germany or on the part of any other government whatsoever which would be directly or in any other manner allied with Germany.

For this purpose the High Contracting Parties will, in a spirit of most sincere collaboration, take part in all international activities aiming at ensuring peace and security of peoples and will contribute their full share to the cause of realization of these high ideals. (Article 3, paragraphs 1 and 2.)

Similar ideas concerning collaboration in political, economic and cultural matters, and especially in regard to a joint policy towards Germany, are expressed in other treaties, though the wording might not be identical. The Soviet-Bulgarian treaty provides a good illustration. Article 1 reads:

The High Contracting Parties bind themselves to take jointly all measures within their power to set aside all threats of revival of aggression by Germany or any other state whatsoever which may unite itself with Germany directly or in any other manner whatsoever.

The High Contracting Parties state their intention to participate with a spirit of most sincere collaboration in all international actions having for aim to secure peace and security and to contribute fully in the implementation of these noble tasks.

This is completed by Article 5:

The High Contracting Parties declare that they shall develop and strengthen the economic and cultural ties between the two states in a spirit of friendship and collaboration, in conformity with the principles of mutual respect of their independence and sovereignty and non-intervention in the domestic matters of the other state.³⁵

³⁵ Provisions concerning mutual collaboration are to be found in the following articles of the other treaties: Arts. 1 and 2 of the Czechoslovak-Polish treaty; Arts. 8 and 5 of the Soviet-Finnish treaty; Arts. 1 and 5 of the Soviet-Rumanian, Soviet-Hungarian, Yugoslav-Hungarian, Yugoslav-Rumanian, Rumanian-Hungarian, Polish-Bulgarian, Polish-Hungarian, Rumanian-Czechoslovak, Polish-Rumanian, and Czechoslovak-Hungarian treaties; Arts. 1, 2 and 5 of the Czechoslovak-Yugoslav and Albanian-Yugoslav treaties; Arts. 1, 5 and 6 of the Yugoslav-Bulgarian, Bulgarian-Albanian, and Rumanian-Bulgarian treaties; and Arts. 1, 2 and 6 of the Bulgarian-Hungarian and Czechoslovak-Bulgarian treaties.

The coöperation has been further assured by provisions concerning consultation. One finds a typical clause in Article 4 of the Soviet-Rumanian treaty: "The High Contracting Parties will consult with regard to all important international issues concerning the interests of the two countries." Similar provisions exist in most of the other Eastern European treaties.³⁶ It is interesting that the Soviet system is not yet endowed with any regional consultative council similar to those which have been established by Article 7 of the Brussels Pact and Article 9 of the Atlantic Pact. But the members of the Soviet system have at their disposal a regional Council for Economic Mutual Assistance on which the Soviet Union, Bulgaria, Czechoslovakia, Hungary, Poland and Rumania are represented, the Communist Information Bureau and informal contacts among the Communist leaders; those less formal means of consultation assure a most effective coördination of their policies.

Specific conditions of some satellite countries required, of course, special, more detailed provisions concerning the coöperation of some of those states. For instance, the Albanian-Yugoslav treaty of July 9, 1946, was followed by another agreement concluded on November 27, 1946, concerning a customs union to be formed by the two countries. This additional treaty contained stipulations aiming at the coördination of economic plans and policies, mutual economic assistance, uniformity of prices, and the creation of a monetary and customs union. Article 5 of the Yugoslav-Bulgarian treaty of November 27, 1947, included a promise of a similar economic union. This treaty, like the Polish-Yugoslav, the Czechoslovak-Polish and the Polish-Bulgarian treaties, mentioned the fraternity of Slavic nations, a theme much in favor with the Soviet Government.³⁷ The treaty between Bulgaria and Albania was accompanied by a protocol which provided for a concerted economic policy of the two countries and Yugoslavia. All these treaties pointed towards the union of the Balkan satellites, a plan which had been sponsored by Tito and Dimitrov and was abandoned because of the cool reception in

³⁶ The following articles of the other treaties concern consultation:

Art. 2 of the Polish-Yugoslav, Yugoslav-Bulgarian, Yugoslav-Hungarian, Bulgarian-Albanian, Yugoslav-Rumanian and Rumanian-Hungarian treaties; Arts. 1 and 2 of the Bulgarian-Rumanian treaty; Art. 3 of the Czechoslovak-Hungarian and Rumanian-Czechoslovak treaties; Art. 4 of the Soviet-Bulgarian, Soviet-Hungarian, Polish-Bulgarian, Polish-Rumanian and Polish-Hungarian treaties; Art. 5 of the Czechoslovak-Bulgarian and Bulgarian-Hungarian treaties.

³⁷ The references to the Slavonic brotherhood are contained in the preambles to the Polish-Yugoslav, Polish-Czechoslovak, and Polish-Bulgarian treaties, and in the Bulgarian-Yugoslav treaty (Art. 1). For instance, the preamble of the Polish-Yugoslav treaty contained such a paragraph: "Desiring to strengthen the bonds of eternal friendship between the brotherly Slav nations of both states, particularly strengthened and established during the joint combat for freedom, independence and democracy against Germany and her allies during the past war. . . ."

Moscow and also of the rift which appeared between Tito and the Cominform.

The Polish-Czechoslovak treaty was accompanied by a protocol which pledged the two parties to settle by special agreements the pending territorial questions (this meant mainly the problem of the Teschen Silesia), to coöperate in economic and cultural matters, and to guarantee to Czechoslovaks in Poland and to Poles in Czechoslovakia the opportunity of economic, cultural, political and national development, especially in regard to schools, associations and coöperatives.

The estrangement with Yugoslavia was compensated by Bulgaria in her agreement with Rumania. Article 5 of this treaty of mutual assistance contains a promise of a customs union which should probably replace the abandoned scheme of a Yugoslav-Bulgarian-Albanian economic union.

The Soviet-Chinese treaty of 1950 pledges the parties (1) to undertake jointly all necessary measures to prevent an aggression or violation of peace on the part of Japan or any other state allied with her directly or indirectly in acts of aggression, and to take part in all international actions calculated to ensure peace and security of the world (Article 1); (2) to work together in order to promote the conclusion in the shortest possible time of a peace treaty with Japan (Article 2); (3) to consult each other on all important international matters concerning their mutual interests (Article 4); (4) to strengthen their economic and cultural ties and to render each other economic assistance (Article 5).³⁸

The treaties of the Soviet system, unlike the Western arrangements, do not include any provisions relating to any regional or bilateral procedures of pacific settlement of disputes.

It is interesting to compare the respective dates of the completion of the two rival systems. The Soviet system was built up in the period between December 12, 1943, and February 14, 1950. The two Western pacts concerning European security were signed, respectively, on March 17, 1948 (Brussels Pact) and on April 4, 1949 (Atlantic Pact). In other words, the Western Powers began to take regional measures to safeguard their security at a time when the main framework of the Soviet system had been completed. It is probably a sheer coincidence that both rival systems have been built up for the same duration of twenty years. This is the duration of the main Western agreement, namely, the Atlantic Pact, although the Brussels Pact is valid for fifty years. All Soviet agreements have been concluded for twenty years, with two exceptions: the Soviet-Finnish treaty, whose validity extends over ten years only,

³⁸ The Soviet-Chinese treaty of mutual assistance was signed simultaneously with two other agreements dealing with the financing by the Soviet Union of mutual trade, and with Soviet rights regarding the Manchurian railroads, Port Arthur and Dairen. It is beyond the scope of this article to comment on those two agreements.

and the Soviet-Chinese treaty which is concluded for thirty years like the previous one signed by the Nationalist Government. The wording of the clause concerning duration corresponds usually to the terms of Article 6, paragraph 2, of the Soviet-Czechoslovak treaty:

The present treaty shall remain in force for a period of twenty years from the date of signature, and if one of the High Contracting Parties at the end of this period of twenty years does not give notice of its desire to terminate the treaty twelve months before its expiration, it will continue to remain in force for the following five years and for each ensuing five-year period unless one of the High Contracting Parties gives notice in writing twelve months before the expiration of the current five-year period of its intention to terminate it.

Although it is clear from the text of all those treaties that they cannot be denounced before the expiration of the period of twenty years, yet all Yugoslav treaties were denounced unilaterally by the Soviet Bloc in October, 1949.

The final observation which cannot escape attention of any one analyzing the Soviet agreements concerns their striking similarity. Every treaty, be it the Soviet-Chinese or the Bulgarian-Hungarian, follows the same basic pattern. It is true to such an extent that one cannot help feeling surprised each time one is confronted with some unusual variation on the familiar theme or with an unexpected omission of some customary clause.

THE RESPONSIBILITY OF THE SUCCESSOR STATE FOR WAR DEBTS

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It is the unalterable fate and the inevitable risk of any debt that its value is closely connected with the fate and actions of the debtor whose assets are subject to the liability. This applies especially to the public debts of a belligerent state whose wealth and resources, and sometimes its very existence, are at stake. The domestic laws of almost every civilized country protect the creditor against the effects of legal changes and of non-remunerative mutations affecting all or an important portion of the property subject to the liability. This liability remains with the transferred property. To a certain extent it is legally vested in the person who succeeds to the property rights.

The application of a similar principle in international law in the case of major territorial changes is less rigid, and is met by an increasing tendency to discriminate against odious debts. Among these are the debts arising out of transactions which helped or are presumed to have helped the defeated country in waging or preparing war against the successor state or its allies. Thus, the states are reluctant to recognize their predecessor's war debts and to assume any responsibility for them.

Although the definitions of these debts vary in the different jurisdictional and conventional acts, they may be classified as follows: (1) debts contracted *before* the war originating from deliveries which were directly or indirectly employed for military purposes, or debts from loans the proceeds of which served such purposes; (2) debts contracted *during* the war.

If the repudiation of such a debt concerns only the portion of a public debt attributable to a ceded area, the affected state remains responsible for the total amount of its debt, although its solvency may be affected by the territorial loss. But if the debtor state has ceased to exist as an independent entity, as in the case of Germany after World War II, the rejection of those debts by the successor state means that they are practically canceled. Therefore they cannot even be used to offset claims of the former debtor state or its nationals.

The countries affected by this policy continue to protest against the rejection of their claims. The issue has not yet been decided by an inter-

national tribunal. A Swiss proposal to submit the question to the International Court of Justice was not accepted by the Allies in the course of the negotiations which resulted in the Washington Agreement of May 25, 1946, on the delivery of German assets in Switzerland.¹ The Western Allies based their claim on an ordinance of the Military Government in Germany providing for the return to Germany of German property in the neutral countries. Switzerland tried to offset this Allied claim with its own claim against the German Reich derived from an advance of more than a billion Swiss francs which Switzerland had granted Germany in 1940 and 1941 under the Swiss-German clearing-system. The final settlement was a political deal rather than an agreement based on legal terms. The Western Allies reduced their demands to 50% of the assets and left the other 50% to Switzerland.

When the Soviet Union claimed the German assets in Finland transferred to her by the Control Council for Germany, Finland tried to set up a similar claim. But in the course of the negotiations leading to the Soviet-Finnish agreement of February 3, 1947, the Soviet Union refused to recognize the German debt, because it had been contracted during the German war against Russia.

State practice is not uniform regarding the treatment of debts of an annexed state or of ceded areas.² Thus, international law has not evolved strict rules which are sanctioned by custom or express recognition concerning the treatment of such debts. Many different rules have been advanced by the writers. They have only one thing in common, that they are more or less expressly based on equity.³ Equity and the different

¹ See Department of State Bulletin, Vol. 14 (1946), pp. 955, 1101, 1121. For references especially concerning the Swiss point of view in this matter, see M. Domke, *The Control of Alien Property* (1947), pp. 12, 279, 280.

² Cf. Max Huber, *Die Staatensukzession* (1898), and Ernst H. Feilchenfeld, *Public Debts and State Succession* (1931), both of whom refer to state practice; Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (1918), p. 202; Arthur Berriedale Keith, *The Theory of State Succession* (1907), p. 58; T. J. Lawrence, *The Principles of International Law* (4th ed., 1911), § 497.

³ The principle that the benefit shall not pass without the burden is based upon equity; it is stressed by the authors in different versions: Cf. Gilbert Gidel, *Des effets des annexions sur les concessions* (1904), p. 82; Paul Guggenheim, *Beiträge zur völkerrechtlichen Lehre vom Staatenwechsel* (1925), p. 42; Oppenheim-McNair-Lauterpacht, *International Law* (6th ed., 1940), Vol. I, p. 127; Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), p. 172 *et seq.*; Anzilotti, *Corso di diritto internazionale* (3rd ed., 1923), Vol. I, p. 288 *et seq.*; Halleck, *International Law* (4th ed., 1908), p. 529; Report of Transvaal Concession Commission (Parl. Papers South Africa, 1901, cmd. 623); decision in *West Rand Central Mining Co. v. King*, [1905] 2 K. B. 391; Eduard Heilfron *Kriegsschadenrecht*, Vol. II (1918), p. 460; G. H. Hackworth, *Digest of International Law* (1940), Vol. I, p. 391 *et seq.*; Arrigo Cavaglieri, *La dottrina della successione di Stato a Stato e il suo valore giuridico* (1912), pp. 12-38; Schoenborn, *Staatensukzessionen* (1913), pp. 7-9; Carré de Mahberg, *Contribution à la théorie générale de l'Etat* (1920), pp. 62-65;

doctrines based upon it may determine the attitude of states in future settlements or in their municipal legislation. But the principles thus developed are not believed to be rules of positive international law in the strict sense, able to replace conventions or agreements or to oblige the successor state to establish certain rules in international conventions or in municipal legislation.⁴ Thus, the recognition of the predecessor's public debts remains a merely political decision. Therefore it is only subject to the rules of international law inasmuch as the discretionary power of a state is limited by a fundamental principle of international law—international morality. Good faith ought to govern international relations, and from this standard of international morality certain duties may be derived.⁵ If a conquering state were recklessly to repudiate all the liabilities of the country which it absorbed, such conduct would certainly be disapproved by the public opinion of all civilized peoples and

Orlando, *Principii di diritto costituzionale* (1920), p. 37; Pradier-Fodéré, *Traité de droit international public Européen et Américain* (1885), Vol. I, p. 279; Nicolas Politis, *Les emprunts d'Etat en droit international* (1894), p. 108; Lapradelle-Politis in *Recueil des arbitrages internationaux*, Vol. II, p. 555 et seq.; Appleton, *Des effets des annexions de territoire sur les dettes de l'Etat démembré ou annexé et sur celles des provinces, départements . . . annexés* (1894), p. 32; G. S. Freund, *Die Rechtsverhältnisse der öffentlichen Anleihen* (1907), p. 172 et seq.; Pierre Descamps, "La définition des droits acquis, sa portée générale et son application en matière de succession d'Etat à l'Etat" in *Revue générale de droit international public*, XV, pp. 385-400 (1908); Westlake, *International Law* (2nd ed.), p. 74; Hannis Taylor, *A Treatise on International Public Law* (1901), p. 201; Ludwig von Rogister, *Zur Lehre von der Staatennachfolge* (1903); Arnold Bennet Hall, *Outlines of International Law* (1915), p. 11 et seq.; Marques de Olivart, *De los principios que rigen la succion territorial en los cambios de soberania* (1906), and the same in *Tratado de derecho internacional publico* (1903-1904), Vol. I, pp. 174, 177; Joseph Kohler, *Grundlagen des Völkerrechts* (1918), p. 99; Gabba, *Lo stato e il codice civile* (1882), Vol. II, p. 364 et seq., p. 682. Also the analogies to certain principles of the civil law constitute tendencies of equity in international law. Thus, some other writers regard state succession as something analogous to private succession under the law of inheritance. See Fritz von Martens, *Das Internationale Recht der zivilisierten Nationen* (German edition, 1883), Vol. I, p. 278; Bonfils-Fauchille, *Manuel de droit international public* (8th ed., 1914), Vol. I, p. 343 et seq. The maintenance of public debts is founded on the application of the principles of unjust enrichment by Cavaglieri, *op. cit.*, pp. 134-145; Jéze, *Le partage des dettes publiques au cas de démembrement du territoire* (1921); Gilbert Gidel, *op. cit.*; Rivier, *op. cit.*, Vol. I, p. 69; Appleton, *op. cit.*, pp. 38-42; A. N. Sack, *Les effets des transformations des Etats sur leurs dettes publiques* (1927), Vol. I, p. 76 et seq.

⁴ Cf. Feilchenfeld, *op. cit.*, § 283, p. 591; Lippert, *Handbuch des Internationalen Finanzrechts* (1928, 2nd ed.); Report of the Transvaal Concession Commission; Walter Schoenborn, Carré de Mahlberg, Orlando, Cavaglieri, Guggenheim, Kelsen, Bonfils-Fauchille, Politis, Anzilotti, Gidel, Oppenheim-McNair-Lauterpacht, see *supra*, note 3; Keith, *loc. cit.*

⁵ See Decision No. II of the Permanent Court of Arbitration in the case of the Preferential Rights Claimed by the Blockading Powers from Venezuela (1904); Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (1945), Vol. I, p. 14.

would have to be considered as a violation of international law.⁶ But as the recognition of the predecessor's public debts is only a question of international morality, the repudiation of certain so-called "odious" debts would have to be considered as conforming with international law and as justifiable, if the exclusion corresponds equally to certain moral principles which are confirmed by well-established traditions of international practice.

Odious debts are such debts which for ethical, moral or political reasons are disapproved by the successor. If the refusal to recognize such debts is founded more on moral and sentimental arguments⁷ than on rules of international law, such arguments may be taken into full consideration, provided that the claim itself is founded on good faith and moral reasons only. Since the recognition of certain debts of an annexed state or a ceded area is a political decision, the successor state is free to decide in accordance with its own moral, ethical and political conceptions. Every state at war defending its own existence and political convictions is justified in considering its own case as just, and in consequence the enemy's action combatting him as an international wrong. The right to such an appreciation of its own political action is the supreme expression of sovereignty. Therefore, debts contracted in order to prepare, to maintain or to increase the war effort of the annexed or diminished state in its war against the successor state may be disapproved and considered as odious debts by the latter.

As the recognition of a predecessor's debt by the successor means that the burden of such a debt is imposed directly or indirectly on its own nationals, the successor state has often been reluctant to recognize debts which had been contracted in order to destroy it.

THE TREATMENT OF WAR DEBTS IN STATE PRACTICE

Before the 18th century the treatment of debts of annexed states or ceded areas rarely was mentioned in peace treaties or international conventions. A tendency to distinguish war debts appears for the first time in the Peace Treaty of Campo Formio of October 17, 1797, between France and the Emperor of the Holy German Empire. In contrast to other debts of the ceded areas, war debts were exempted from the allocation by Article 4 of the Treaty. In the same way, an exception of war debts was contained in the Franco-Prussian Peace Treaty of Tilsit of July 9, 1807. Article 24, applying to Saxony and Danzig as well as to Westphalia, provided that, while debts contracted by the sovereign in his capacity as ruler of a certain area were recognized by the succeeding states, debts contracted during the war between France and Prussia were excluded. In the con-

⁶ See Guggenheim, *op. cit.*, p. 95; Feilchenfeld, *op. cit.*, § 283, p. 591; Hall, *loc. cit.*; Oppenheim, *loc. cit.*; Westlake, *loc. cit.*; Anzilotti, *loc. cit.*

⁷ Feilchenfeld, *op. cit.*, § 349b, p. 719.

vention concerning the execution of this Treaty of April 11, 1811, signed by the King of Prussia and the King of Westphalia,⁸ war debts were defined as all debts contracted after August 1, 1806 (Article 13). The only determining factor of a "war debt" is the date when it was incurred.

Nevertheless, at this time the exception of war debts was not yet practiced as a rule, for no mention of war debts was made in other peace treaties or conventions of this period by which important areas were ceded. Thus, no exception of war debts was made either in the Peace Treaty of Lunéville of February 9, 1801, and of Pressburg, December 26, 1805, both concluded between France and the Emperor of the Holy German Empire; or in the Peace Treaty of Vienna of October 14, 1809, between France and Austria or in the Peace Treaties of Paris, May 30, 1814, between France and the Allies. In the treaty of May 18, 1815, between Prussia and the Kingdom of Saxony war debts are not specially mentioned, neither are they considered in the Peace Treaty of Kiel of January 14, 1814, between Denmark on the one side, and Great Britain, Russia and Sweden on the other, by which Denmark ceded Norway to Sweden. Also in the treaties between Spain and Bolivia and Costa Rica, both signed at Madrid on May 10, 1850 (Article 5 *et seq.*) no distinction was made between the different kinds of debts.

By the terms of Article 8 of the Treaty of Zurich of November 10, 1859, the Sardinian Government "was to succeed to the rights and obligations resulting from contracts which had been regularly made by the Austrian administration for objects of public interest and which concerned especially the ceded areas." Thus, here again a distinction between certain debts is provided, with the use of the proceeds as the criterion. Nevertheless, in all decisions of Italian courts concerning Austrian debts a negative decision was in no case based on the fact that they were war debts.⁹

The same formulation as in Article 8 of the Treaty of Zurich was used in Article 5 of the Convention of Paris of 1860 (cession of Nice and Savoy to France), and in Article 8 of the Treaty of Vienna of 1866 between Sardinia and Austria.

The exclusion of war debts by the successor is clearly stated in Article XVII of the Final Peace Treaty of Vienna of 1864 between Denmark on one side and Prussia and Austria on the other, which provided:

The new Government of the Duchies (Sleswig-Holstein) succeeds to the rights and obligations contracted by the administration of His Majesty the King of Denmark which concern the ceded areas. It is to be understood that obligations resulting from contracts concluded by the Danish Government in connection with the war and

⁸ Cf. de Martens, *Nouveau Recueil des Traités et Autres Actes Relatifs aux Rapports de Droit International*, Vol. I, p. 365.

⁹ See the decisions of Italian tribunals cited by Fellenfeld, *op. cit.*, p. 215, note 117.

the federal execution are not comprised in the aforementioned provision.¹⁰

The principle that responsibility for war debts can be repudiated by the successor state was also adopted by the Prussian and later German Government in municipal legislation, after the Duchies had been annexed by Prussia following the war between Prussia and Austria, by the Peace Treaty of Prague (1866). Prussia refused to pay war debts arising from requisitions of the Danish Army in the Duchies, and for which compensation was due under the Danish requisition laws of May 9, 1806, and November 28, 1811.¹¹ The question was finally settled in 1875 after the Franco-German war, when the inequity of such treatment appeared, because of the different way in which the claims of compensation for requisitions by the French Army in Alsace-Lorraine had been dealt with. But the indemnity of 4½ million marks granted in 1875 was declared as a gracious act of the King only, without recognition of any legal responsibility.¹²

The problem of "odious" debts was fully discussed in relation to the Cuban debt in the course of the negotiations between the United States and Spain preceding the conclusion of the Peace Treaty of Paris. The American Delegation maintained that the Cuban loans contracted after 1890 were used for odious purposes so far as they were spent on foreign expeditions of Spain and the cost of repression of insurrections against Spanish rule.¹³ The repudiation of this debt was founded principally on moral arguments which were re-enforced by the affirmation that "the creditors knew that the revenues were pledged for the continuous effort to put down a people struggling for freedom, and that they took the obvious chances of their investment on so precarious a security." The Cuban loan was excluded from settlement in the Paris Peace Treaty of December 10, 1898.

English opinion on the question of war debts and their settlement by the successor state was pointed out after the annexation of the South African Republic, when the British Government by a proclamation of June 6, 1900,¹⁴ refused to recognize the validity of certain war debts of the South African Republic.¹⁵ In order to define the British point of view the British Government appointed in August, 1900, a commission of which the Hon. A. Lyttleton was chairman. In the report of this com-

¹⁰ Cf. Martens, *Nouveau Recueil Général des Traités*, Vol. XVII, 2, p. 474.

¹¹ Cf. Hans J. Cahn, *Das Kriegsschadenrecht der Nationen* (1947), Bk. 2, § 123 b, p. 252, § 139 c, p. 268 *et seq.*

¹² See Prussian law of April 9, 1875, Cahn, *op. cit.*, Bk. 2, § 139 c, p. 269.

¹³ Cf. arguments advanced during the negotiations at Paris, 55th Cong., 3rd Sess., Senate Doc. No. 62, pt. 2, p. 50; L. von Bahr, "Die kubanische Staatsschuld" in *Die Nation*, Vol. XVI (1899), pp. 425-427, who generally approves those arguments.

¹⁴ See Parl. Papers, 1900, VI, Cd. 426, p. 9, and Martens, *Nouveau Recueil Général des Traités* (2nd series), Vol. XXXII, p. 145.

¹⁵ Cf. Cahn, *Kriegsschadenrecht*, Bk. 2, § 174, p. 313 *et seq.*

mission it is stated that an annexing state is justified in refusing to recognize obligations incurred by the annexed state "for the immediate purposes of war against itself."¹⁶ The exception of war debts was also admitted by Lord Robert Cecil in his argument for the West Rand Central Gold Mining Company, where it was based only on "what was regarded as a natural demand of justice" (equity).¹⁷ This opinion has been generally approved by British authors, such as by Arthur Berriedale Keith,¹⁸ Erle Richards,¹⁹ Colman Phillipson²⁰ and Norman Bentwich.²¹

In the Peace Treaties of Paris which ended World War I, the principle of the exclusion of odious and mainly war debts was generally applied by the Allied and Associated Powers, although its accordance with the rules of international law was contested by the Central Powers.²² Hungary, for instance, argued that it would be against international law to distinguish debts according to their origin.²³ In their reply to this argument the Allied and Associated Powers stated that they were unable to depart from the principle that it was impossible to impose the burden of a war debt on the states arising from the dismemberment of Hungarian territory, the debt being contracted to support a war of unjust aggression against the Allied and Associated Powers with whom the states arising from the dismemberment of the Austrian-Hungarian Empire had ranged themselves.²⁴

In application of this principle, Article 254 of the Treaty of Versailles of June 28, 1919, provides:

The Powers to which German territory is ceded shall, subject to the qualifications made in Article 255, undertake to pay:

- (1) A portion of the debt of the German Empire, as it stood on August 1, 1914,
- (2) A portion of the debt as it stood on August 1, 1914, of the German State to which the ceded territory belonged.

¹⁶ Cf. Report of the Transvaal Concession Commission, Parl. Papers, 1901, XXXV, Cd. 623.

¹⁷ Published in *Zeitschrift fuer Voelkerrecht*, Vol. I, p. 93 *et seq.*

¹⁸ In his work, *The Theory of State Succession with Special Reference to English and Colonial Law* (1907).

¹⁹ Cf. "The Liabilities of a Conqueror" in *The Law Magazine and Review*, Vol. XXXVIII, p. 129.

²⁰ See *Termination of War and Treaties of Peace* (1916), p. 43.

²¹ See *The Law of Private Property in War* (1907), p. 66.

²² Cf. "Observations" on the Conditions of Peace of May 28, 1919, in *Comments by the German Delegation on the Conditions of Peace*, p. 47; and *Expert Opinion of the German Financial Delegation*, p. 6.

²³ See *The Hungarian Peace Negotiations*, published by the Hungarian Ministry of Foreign Affairs (1922), Vol. II, p. 321.

²⁴ *Ibid.*, Part IX of the reply of the Allied and Associated Powers, in the *Hungarian Peace Negotiations*, Vol. II, p. 557.

In the same way the Treaty of Saint Germain of September 10, 1919 (Article 203), and the Treaty of Trianon, April 4, 1920 (Article 186), do not distribute among the successor states debts contracted by Austria or Hungary after July 28, 1914. The Treaty of Neuilly of November 27, 1919, excepts the part of the Bulgarian public debt contracted after October 11, 1915, "and the portion contracted between August 1, 1914, and October 11, 1915, which was employed by Bulgaria in preparing the war of aggression" (Article 141, §§ 1, 2). The same principle ruled the settlement in the Treaty of Lausanne of July 24, 1923. It did not charge the Balkan War cessionaries with portions of any loans contracted after October 17, 1912 (Article 50, par. 1). The rule was equally applied to the islands which Italy acquired under Article 15 of this treaty (Article 50, par. 2).

According to all these provisions a debt is considered to be a war debt by reason only of the fact that it has been incurred during the war. Thus, the date of incurrence constitutes irrefutable supposition, a *praesumptio iuris et de iure* of the odious character of such debt, and even the fact that the proceeds of the debt have been pledged for peaceful purposes cannot alter it. The question was dealt with by the Reparation Commission in connection with the Treaties of St. Germain and Trianon. It was held that the Teschen Chainbridge Loan, contracted in 1917, was to be treated as a war debt, although its proceeds had been spent on peaceful and productive purposes.²⁵ Again the Commission decided that a Hungarian loan made prior to the inception of World War I, which had been converted and replaced by the issue of a new loan during the war, was to be treated as a war loan.²⁶ Indeed, in modern warfare no other decision seems possible, as all the resources of a belligerent country are used and fully exploited for the conduct of war. Under these conditions every loan in labor, kind or money delivered to belligerents increases their war effort by liberating other means for the immediate war purposes.

Thus in all the peace treaties of the 20th century, by which larger areas have been ceded, the war debts have not been recognized by the cessionary. If Feilchenfeld ²⁷ holds that the exception of war debts has not been generally admitted since World War I because the Central Powers did not approve of the arguments for such an exemption, he overlooks the fact that there was a difference between the political attitude of their delegations during the peace negotiations and the legal opinion prevailing in these countries as it has been expressed by their national courts and their municipal legislation. Thus, the highest German Court, the Reichsgericht, adopted in its decision of June 3, 1924,²⁸ and in that of 1926 published

²⁵ Cf. Reparation Commission, Annex 1510, p. 10.

²⁶ Cf. Reparation Commission, Annex 1510.

²⁷ *Op. cit.*, § 390, p. 786.

²⁸ *RG.Z.*, Vol. 108, p. 298.

in Vol. 113 of the *Entscheidungen des Reichsgerichts in Zivilsachen* (1926), p. 281, the theory that under general rules of international law a successor state is not liable for the debts which have been contracted during and in connection with the war against it.

The municipal law which Germany imposed on the annexed countries in World War II shows that the political measures of the German Reich, whenever it was able to impose its will, were also based on this legal opinion.

Germany, by the order of October 24, 1940,²⁹ not only repudiated all debts of the former Polish state, after having annexed part of it and confiscated all its property, but also refused to recognize in all the annexed and most of the occupied territories liability for requisitions of the previous sovereign. For the annexed territories in the east the order concerning the application of the German War Damage Act in the incorporated areas of the east of January 28, 1942,³⁰ excludes any indemnity for the requisitions of the former sovereigns. The same is true of the annexed territories in the west which formerly belonged to France, Belgium or Luxembourg, under the first order concerning the extension of the German War Damage Legislation of April 18, 1941,³¹ and the third similar order of July 6, 1942,³² and in the annexed countries which formerly belonged to Yugoslavia (Untersteiermark, Kaernten and Krain) under the fourth order concerning the extension of the German War Damage Legislation of November 26, 1942.³³ Furthermore, liability for the debts of the occupied countries incurred by the requisitions for their national armies before the occupation was excluded in the Serbian order of July 16, 1941,³⁴ and in the Norwegian law of August 21, 1941.³⁵

The Peace Treaties of Paris of February 10, 1947, with the Axis satellites show the most recent development of state practice in dealing with war debts. The Italian Treaty, Annex X, subparagraph 5 (concerning the Free Territory of Trieste) and Annex XIV, subparagraph 6 (concerning the ceded former Italian colonies) reads:

The Government of the Successor State [Free Territory] shall be exempt from the payment of the Italian public debt, but will assume the obligations of the Italian State towards holders who continue to reside in the ceded territory [Free Territory], or who, being juridical persons, retain their *siège social* or principal place of business there, in so far as these obligations correspond to that portion of this debt which

²⁹ § 1, subsec. 1, see *Verordnungsblatt des General Gouverneurs in Polen*.

³⁰ § 1, "Dritte Durchführungsverordnung zur Kriegssachschaden-Verordnung in den eingegliederten Ostgebieten," *Reichsgesetzblatt*, 1942, Part I, p. 46.

³¹ § 5, subsection 4, *Deutsches Reichsgesetzblatt*, 1941, Part I, p. 215.

³² § 5, *RGBl.*, 1942, Part I, p. 446.

³³ *Ibid.*, p. 665.

³⁴ Article 1, *Amtsblatt der Serbischen Ministerien*, 1941, p. 941.

³⁵ § 24, subsection 2, *Verordnungsblatt fuer die besetzten norwegischen Gebiete*, 1941, Abt. II, p. 200.

has been *issued prior to June 10, 1940*, and is attributable to public works and civil administrative services of benefit to the said territory but not attributable directly or indirectly to military purposes.

Full proof of the source of such holdings may be required from the holders. (*Italics added.*)

By charging the holder with the proof of the facts determining the recognition of the public debt of the predecessor, the Allied and Associated Powers went even a step further than the prior practice in distinguishing between certain of the predecessor's public debts.

The signers of the treaties apparently presumed that the successor state is exempted from any liability for the predecessor's public debt, unless it voluntarily agrees to assume the responsibility. Thus, failure to mention the debts in the Treaties with Hungary, Bulgaria, Rumania and Finland excludes the recognition of any public debt or portion of debt by the successor states. Here again war debts are affected, because the major territorial changes provided in these treaties consist in the retrocession of territories annexed by the defeated countries in the course of the war. But the exemption is founded also on the non-recognition of the interim governments created by forced or German-sponsored territorial changes.

CONCLUSION

From all these precedents it becomes evident that the repudiation of war debts by the successor state has been well established and continuously applied during the 20th century in state practice. As the Allied Powers which were parties to the last Paris Peace Treaties will form the majority of the nations who will draft the conditions of the German and Austrian peace treaties, it may be presumed that there the same rules will be applied. That implies that the Allied and Associated Powers will not recognize any liability for debts arising from transactions with the Nazi régime, in accordance with the findings of the Nuremberg trials, for the reason that this régime had been preparing for war ever since it seized control of Germany. Similarly, Austria will not be held responsible for any debt of the Greater German Reich of which it formed a part after the *Anschluss*. This attitude of the victorious Powers may result in the total cancellation of the German and Austrian debt incurred after establishment of the Nazi régime in both countries, even though this régime had been recognized as the Government of Germany by all countries.

Many writers still are opposed to such a rule; they hold that at least *bona fide* creditors should be protected, and they disapprove of a principle that a legally founded debt should depend on the issue of war between the debtor and a third nation.³⁶

³⁶ The exception of war debts is strongly opposed by Feilchenfeld, *op. cit.*, § 849, p. 719; Lawrence, *loc. cit.*; Oppenheim, *loc. cit.*; Amos S. Hershey, "The Succession of States" in this JOURNAL, Vol. 5 (1911), p. 285; and Holtzendorff, *Handbuch des Völkerrechts* (1887), Vol. II, p. 33 *et seq.*

Such a point of view is no longer justified. The unalterable attitude of at least one of the belligerent parties, the Allied and Associated Powers of World War I, succeeded by the United Nations in World War II, who theoretically maintained and politically applied the exemption of war debts for a successor state, made evident the risk of credits granted to Germany preparing for or involved in war. Thus, the recognition of the debts by the successors after the debtor's defeat would mean to increase its value by freeing it from a risk that was or had to be discounted. The non-recognition of war debts also constitutes a warning to anyone who, by commercial transactions, would aid potential enemies to prepare war or wage war against the successor state. The rejection of those debts is therefore also a legal measure of self-defense. The actual practice in rejecting war debts of the predecessor is morally and politically justified and must therefore be considered as being in accordance with the rules of international law.

CAPTURED ENEMY PROPERTY: BOOTY OF WAR AND SEIZED ENEMY PROPERTY

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In an address before the 1949 annual meeting of the American Society of International Law this writer remarked that the laws governing captured enemy property have never been codified or collected in one place and are very difficult to find and apply.¹ The lack of a handy tool in the field of captured property has been noted at times by others, including Professor H. A. Smith, formerly a colonel with the British 21st Army Group, who observed that the "law of booty is almost unwritten"² and Judge Manley O. Hudson, who wrote some years ago in an editorial in this JOURNAL that the "literature on captured property and war booty seemed inadequate."³

In the fall of 1947 the now famous case of the captured Hungarian horses focused the attention of the Congress as well as that of the various interested executive departments of this Government on the difficulties arising in the application of the legal principles governing captured property when faced with the political concept of restitution, and the various considerations inherent therein.⁴

I—DEFINITIONS

The first question to be determined is: What is captured enemy property?

Generally speaking, any property which is useful in war or is taken or seized on the ground of military necessity for the purpose of depriving the enemy of its use or of turning it to the captor's advantage is considered

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¹ Proceedings, 1949, p. 104.

² Col. H. A. Smith, "Booty of War," XXIII British Yearbook of International Law (1946), p. 227.

³ Manley O. Hudson, "A Soldier's Property in War," this JOURNAL, Vol. 26 (1932); pp. 340, 342.

⁴ See 80th Cong., 2d Sess., Report of a Subcommittee of the Committee on Armed Services, United States Senate, Questions of Ownership of Captured Horses (Washington, D. C.: Government Printing Office, 1948).

captured enemy property.⁵ However, international law restricts the taking or seizing of enemy property to that property having the nature of personal as distinguished from real property. Enemy public property and enemy private property are the two classes of enemy personal property, *i.e.*, enemy chattels, susceptible of becoming captured enemy property.⁶

Enemy *public* property is defined as chattels, the title to which is vested in a state or in any agency of such state. Enemy *private* property is defined as chattels, the title to which is vested in an individual, a private corporation or a public corporation not owned by the state or by an agency of the state.

Each of the three words in the term "captured enemy property," has a special significance of its own. John Bassett Moore has ably stated that "The word 'capture' is in law a technical term, denoting the hostile seizure of persons, places and things. . . ." The Supreme Court of the United States has defined the word "enemy" as meaning a "State which is at war with another State."⁸ The word "property" as herein used is restricted to personal property or chattels, and has been defined "in the strict legal sense as the aggregate of rights which are guaranteed and protected by law; more specifically . . . ownership, the unrestricted and exclusive right to a thing."⁹

It would appear therefore that the term "captured enemy property" may be legally defined as "*Chattels, the aggregate of unrestricted and exclusive rights in which has been acquired through hostile seizure on land, in conformity with the international law of war, by a belligerent state from an enemy state or from the inhabitants thereof.*"

Captured enemy property is a fairly modern term which has often been used synonymously with the older term "war booty," recently discussed in this JOURNAL as follows:

"War booty," strictly defined, is limited to movable articles on the battlefield and in besieged towns. Private property which may be taken as booty is restricted to arms, munitions, pieces of equipment, horses, military papers, and the like. Public enemy property which may be seized as war booty is limited to movables on the battlefield, and these need not be for military operations or necessity.¹⁰

It will be readily understood, then, that the term "captured enemy property" defined above embraces much more than the term "war booty,"

⁵ See Oppenheim, International Law, Vol. II, §§ 133-145; Feilchenfeld, The International Economic Law of Belligerent Occupation, pp. 51-61, 93-107; Spaight, War Rights on Land, pp. 410-418.

⁶ *Ibid.*

⁷ John Bassett Moore, International Law and Some Current Illusions, p. 21.

⁸ Swiss National Insurance Co. v. Miller, 267 U. S. 42 (1924).

⁹ Black's Law Dictionary (3d ed.), p. 1447.

¹⁰ Daniel H. Lew, "Manchurian Booty and International Law," this JOURNAL, Vol. 40 (1946), p. 584, at 586.

in that the former includes not only personal property captured on the field of battle, but also personal property seized or requisitioned by an army of occupation.

The concept of war booty is as old as recorded history. It has developed over a period of many centuries from the ancient practice by which the individual soldier was considered to be entitled to take whatever he could find and carry away, to the modern rule under which only the state is entitled to seize property as war booty. The ancient writers, Belli, Grotius and Vattel, were in agreement that the taking of war booty by individual soldiers for their own use was within the legal rights of such soldiers.¹¹ Recently and concurrently with the development of the theory of the inviolability of private property, the practice of warring nations has tended to restrict the taking of war booty by individual soldiers for their own use. Nearly all of the modern writers, particularly Calvo, Fiore, Davis, Hyde and Oppenheim, have condemned the ancient practice and have thrown the weight of their authority behind the idea that the taking of war booty is a right belonging only to a belligerent state.¹² Heffter, however, standing alone among the moderns, believes that international law permits individual soldiers to take war booty for their own use in exceptional cases as a special reward for their efforts.¹³

Opposed to the concept of war booty is the concept of requisitions which, according to Oppenheim, is the outgrowth of the eternal principle that war must support war. Around the beginning of the eighteenth century the armies of civilized nations began to requisition from the inhabitants of the invaded country such property as was needed by the army in lieu of the former practice of appropriating all public or private property obtainable.¹⁴ For centuries the generals of invading armies never gave any thought to paying for requisitioned property, but during the nineteenth century a practice of paying cash for requisitioned property grew up.¹⁵ With the coming into force of the Hague Regulations it became a legal requirement that payments for requisitions must be made in cash, or if payment in cash is impossible, acknowledged by receipt.¹⁶

¹¹ Belli, *De Re Militari et Bello Tractatus* (Translation, Vol. II, Carnegie Endowment for International Peace, 1936), p. 106; Grotius, *On the Law of War and Peace* (Translation, Vol. III, Carnegie Endowment for International Peace, 1925), p. 672; Vattel, *The Law of Nations* (Translation, Vol. III, Carnegie Endowment for International Peace, 1916), p. 292.

¹² Calvo, *Le Droit International Théorique et Pratique*, Vol. IV, p. 240; Fiore, *Nouveau Droit International Public*, Vol. III, pp. 1381-1382; Davis, *The Elements of International Law*, p. 310; Hyde, *International Law*, Vol. III, pp. 806-809; Oppenheim's *International Law* (Lauterpacht, 6th ed.), Vol. II, p. 310.

¹³ Heffter, *Das Europäische Völkerrecht der Gegenwart* (8th ed.), § 135.

¹⁴ Oppenheim, *op. cit.*, p. 316.

¹⁵ Keller, *Requisition und Kontribution*, pp. 5-26.

¹⁶ Art. 52, Regulations respecting the Laws and Customs of War on Land, annexed to Hague Convention IV of Oct. 18, 1907, 36 Stat. 2277; Department of State, Treaty Series, No. 539; 2 Malloy's Treaties 2269.

II—BOOTY OF WAR

It has long been a basic principle of the international law of war that enemy *public* property captured on a battlefield becomes the property of the capturing Power.¹⁷

A recent example of the application of this principle is contained in the case of one X, who during the fighting in France in 1944 investigated a hastily evacuated enemy regimental headquarters and found therein a box of French francs. He kept the box of francs and later used them to buy U. S. money orders which he sent to his wife. X was tried and convicted by court martial for violation of Article of War 80.¹⁸ In its holding the Board of Review stated that Article of War 80 was in accordance with the principle of the international law of war that enemy public property captured in war becomes the property of the government or Power by whose force it is taken, and does not become the property of the individual who takes it.¹⁹

A similar case involving currency, reported by Colonel H. A. Smith,²⁰ concerned three Belgians who on September 3, 1944, were walking along a country road and found in an abandoned German truck two boxes of currency containing 269,940 Belgian and 309,165 French francs. This money, less a certain amount alleged to have been spent by or on their respective wives, was subsequently discovered by the Belgian police in the men's homes. The men were tried and sentenced by the Belgian courts. In this case the physical identity of the currency which had been stolen was clearly established, so there was no difficulty in treating it as booty of war. The crime against Belgian law which had been committed consisted in the unlawful possession of Allied property.

Another case involving currency arose from a claim submitted by an American soldier who was wounded in action against the Germans during the summer of 1944 and took cover in a shell hole where he found a wounded German officer. The German is reported to have said: "Here's something for you, there's plenty more where I got that," and to have given the soldier French currency in the value of \$4,942.87. At the time that he was evacuated to a hospital, the soldier turned over the currency to an American finance officer. Later he submitted a claim for the amount of the money. His claim was denied on the grounds that the circumstances

¹⁷ *Oakes v. U. S.* (1898), 174 U. S. 778, 786; *Brown v. U. S.* (1814), 8 Cranch 110; *Oppenheim, op. cit.*, Vol. II, p. 307; *Spaight, War Rights on Land*, p. 198; *Wheaton's International Law* (7th ed.), p. 307; *Ware v. Hylton* (1814), 3 Dall. 199, 226; *Field Manual* 27-10, par. 327; *Davis, op. cit.*, p. 310; *Hague Convention IV*, 36 Stat. 2277; *Geneva (Prisoners of War) Convention*, 47 Stat. 202; *Geneva (Red Cross) Convention*, 47 Stat. 2074.

¹⁸ For text of Article of War 80, see below, p. 499.

¹⁹ 4 Bulletin of the Judge Advocate General of the Army (hereafter referred to as Bull. JAG) (1945) 388.

²⁰ *Smith, loc. cit.*, p. 235.

of the gift indicated that the money did not belong to the German officer and that unexplained possession by soldiers in the field of unusually large sums of money would justify the conclusion that the money belonged to the enemy government. If so, upon capture it became the property, not of the individual captor, but of the nation in whose army he served.²¹

It is generally held that title to captured enemy public property susceptible of becoming war booty passes from the losing Power to the capturing Power immediately upon the effective seizure, that is, as soon as the property is placed under substantial guard and is in the "firm possession" of the captor, or at the latest, within 24 hours after the seizure,²² without the necessity of an adjudication by a court as is required in the case of prizes captured at sea.²³

It is further generally held that when such a capture becomes perfect, i.e., when title to the property is vested, a subsequent sale is good even against the former owner. The principle is thus established that whatever divests the possession of the original owner and substitutes the military in his place is good capture.²⁴

An interesting and enlightening illustration of these principles is the case of the captured Iranian pistol. During the war certain pistols of American manufacture were shipped to the Soviet Union under Lend-Lease authority. Among these pistols was No. 943481. The history of this pistol from the time of its arrival in Russia until the day it was captured by the Iranian Army in operations against the Iranian rebels in Azerbaidjan is unknown. However, the facts are clear that this pistol was part of a caché of arms which was captured by the Iranian forces during the Iranian civil war. Later the Chief of Staff of the Iranian Army presented the pistol as a trophy of war to a United States Army officer serving as an observer with the Iranian forces. The question of title to the pistol was raised and it was held that legal title had been vested in the Iranian Government by reason of capture. Assuming that the Iranian Government authorized the gift to the United States observer, it would appear that title to Pistol No. 943481 was vested in the United States observer. However, the attention of the interested officer was called to the clause of the United States Constitution which provides that no person holding an office of trust under the United States, shall, without the consent of Congress, accept any present from a foreign state.²⁵

²¹ 4 Bull. JAG (1945) 390.

²² *Oakes v. U. S.*, *supra*; *Porte v. U. S.*, Devereaux' Reports (Ct. Cls., 1856), p. 109, § 433; *Wheaton's International Law*, p. 307; *Halleck, International Law*, p. 366; *Lawrence, Principles of International Law* (6th ed.), p. 430.

²³ *Lamar v. Browne* (1875), 92 U. S. 187, 195; *Young v. U. S.* (1877), 97 U. S. 39, 60; *Wheaton, supra*; *Davis, supra*, p. 211; 3 Phillimore, *International Law*, p. 213.

²⁴ *Hannis Taylor, A Treatise on International Public Law*, p. 540.

²⁵ CSJAGA 1949/1855, March 2, 1949. *Mem. opinion.*

An examination of the origin of the rule of reduction to firm possession indicates that it was during the 16th century that the rule of "possession for 24 hours" was first applied. Later the rule was established that in respect of movable property title went with the seizing and that the mere act of seizing determined the right of property therein, provided that no property was seized the very nature of which had placed it beyond capture.²⁶

C. H. Calvo, writing in 1896, stated the general proposition that:

In order that the belligerent who comes into possession of movable property of the enemy may be able to acquire the serious and real title to these goods, it is absolutely necessary that he retain them in his power for more than 24 hours, the time generally considered as sufficient to place this booty in safety.

Such is the theory, but grave difficulties present themselves when we examine the basis on which rest the rights which war confers concerning private property and the exact moment at which it can be admitted that there is a legitimate transfer of property.²⁷

In our day, Calvo stated, the transfer of title is considered as taking place instantaneously from the moment of capture and the principle of 24 hours is no longer used except in maritime war.²⁸

The Legal Adviser of the Office of Military Government for Germany (OMGUS), in an opinion dated August 5, 1947, considered the question of the applicability of the term "reduction to firm possession" to certain items of captured enemy property which had not been seized but were located in the area of operations. He stated that:

... a belligerent does not acquire title to enemy public movable property until he has reduced it to firm possession. It appears that "firm possession" requires some manifestation of intention to seize and retain the property involved and some affirmative act or declaration of a possessory or custodial nature with respect to the property. The circumstances which will satisfy these two elements of firm possession will, of course, vary in each case. It is, however, our conclusion that the general occupation of an area by a belligerent is not sufficient to satisfy either of the two elements of the doctrine

... property for reduction to firm possession. The property captured by cannon which were

was captured by the Federal forces and continued to remain the property of the United States to this time."³⁰

It is necessary to note that these two cases are not in agreement as to what is needed in order to achieve reduction to firm possession. In the Confederate cannon case it was held that mere seizure and occupation of the territory by the Federal forces was sufficient to reduce the property to firm possession and thus to transfer title to the United States Government. In the OMGUS case, on the other hand, it was held that some indication of an intention to seize and reduce to firm possession must be shown in order to transfer title. It is the opinion of this writer that the OMGUS view is preferable and that some manifestation of intention is necessary. It would furthermore appear that the case of the Confederate cannon could have been decided on much stronger ground, such as that of abandoned property, rather than on the ground of captured enemy property.

There are several classes of property exempted from the rule that captured enemy *public* property becomes the property of the captor state.³¹ The Geneva (Sick and Wounded) Convention of 1929³² provides that the *matériel* and means of transportation of mobile sanitary formations are not generally subject to seizure, but that in case of urgent necessity, after the wounded and sick have been provided for, such material and transportation may be requisitioned. The same convention provides that aircraft used as sanitary transportation, provided it meets the other requirements of the convention, is not generally subject to seizure. The Hague Regulations³³ provide that works of art and science and historical monuments may not be seized, and the Geneva (Prisoners of War) Convention of 1929³⁴ provides that all effects and objects of personal use, except arms, horses, military equipment and military papers, shall remain in the possession of prisoners of war, as well as metal helmets and gas masks.

It is now generally recognized that *private* enemy property is immune from capture on the battlefield.³⁵ There are, however, several exceptions to this rule. Military papers, arms, horses and the like can be seized.

³⁰ 6 Bull. JAG (1947) 238-239.

³¹ See Field Manual 27-10, para. 188.

³² See Arts. 14-18. Arts. 33-37.

August 12, 1949, have since

Thus it has been recently held that horses, raised by the German Army and seized by the United States Army on a German Army breeding farm, became the property of the United States;⁴⁵ that a German commercial cable owned by a private corporation and seized by the United States forces, need not be restored to its private owners prior to the making of a treaty of peace, at which time the question of compensation therefor would also be determined;⁴⁶ and that certain wine vats originally owned by the French Government and used in the supply of the French Army, which were seized by the occupying German forces under Article 53 of the Hague Regulations and sold to defendant, had become the property of the German Reich and, through sale, the property of the defendant.⁴⁷

It is a generally recognized principle of the international law of war that enemy private property may not be seized unless it is susceptible of direct military use, but that it may be requisitioned.⁴⁸ In addition to the general rule, Articles 46 and 47 of the Hague Regulations enacted that private property cannot be confiscated and that pillage is formally forbidden. Article 52 of the Hague Regulations provides that requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the "needs of the Army of occupation" and that such requisitioning shall be in proportion to the resources of the country. They shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall be paid for as far as possible in cash. If not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.⁴⁹

Field Manual 27-10, *Rules of Land Warfare*, states that under Article 52, practically everything necessary for the maintenance of the Army may be requisitioned, *e.g.*, fuel, food, forage, clothing, tobacco, printing presses, type, leather, cloth, etc. It also authorizes the billeting of troops for quarters and subsistence.

Oppenheim wrote in a similar view that: "Requisition is the name for the demand for the supply of all kinds of articles necessary for an army, such as provisions for men and horses, clothing, or means of transport. . . ."; and that "all requisitions must be paid for in cash, and if this is impossible they must be acknowledged by receipt, and the payment of the amount must be made as soon as possible."⁵⁰

Field Manual 27-10 states the rules concerning requisitions to be applied by United States forces. It provides that requisitions must be made under

⁴⁵ JAGA 1947/4808, May 23, 1947. Mss. opinion.

⁴⁶ JAGR 1946/3392, Aug. 30, 1946. Mss. opinion.

⁴⁷ *Etat Français o. Etablissements Monmousseau*, Cour d'Appel d'Orléans, this JOURNAL, Vol. 43 (1949), p. 819.

⁴⁸ See authorities cited in note 5, *supra*.

⁴⁹ 26 Stat. 2277, Department of State, Treaty Series, No. 539.

⁵⁰ 2 Oppenheim 317-318.

the authority of the commander in the locality. It fixes no prescribed method of requisitioning but states that, if practicable, requisitions should be accomplished through the local authorities by systematic collection in bulk. If, for any reason, local authorities fail to make the required collections, they may be made by military detachments. Explaining the meaning of the expression "needs of the army" it states that such expression was adopted rather than "necessities of the war" as being more favorable to the inhabitants, but that the commander is not thereby limited to the absolute needs of the troops actually present. The prices of articles requisitioned will be fixed by agreement if possible, otherwise by military authority. It provides that cash will be paid, if possible, and receipts will be taken up as soon as possible. If cash is paid, coercion will seldom be necessary. The coercive measures adopted will be limited to the amount and kind necessary to secure the articles requisitioned.⁵¹

In the case of *Karmatzucas v. Germany*, the Germano-Greek Mixed Arbitral Tribunal held that only those requisitions were lawful that complied with the provisions of Article 52 of the Hague Regulations, namely, that payment of the amount due should be made as soon as possible after the requisition. As nearly nine years had elapsed since the requisition was made and as full payment therefor had not been made, such requisition was contrary to international law and afforded a good ground for the recognition of the competence of the Tribunal and for an award of compensation.⁵²

There appears to be considerable doubt about the reasoning of the Tribunal concerning the invalidity of the requisition in the *Karmatzucas* pronouncement. As Sir Arnold McNair and H. Lauterpacht, the editors of the *Annual Digest of Public International Law Cases*, have stated, "it is difficult to see how subsequent failure to pay rendered the requisition unlawful *ab initio*. It would have sufficed to hold that the subsequent failure to pay was illegal."⁵³

Oppenheim remarked that "There is little room for doubt that acts of deprivation of property in disregard of international law are incapable of creating or transferring title."⁵⁴ The Belgian Court of Cassation held that a requisition unaccompanied by a receipt or payment was no more capable of transferring property than theft,⁵⁵ and this view was also that of the Hungarian Supreme Court.⁵⁶ It would follow, therefore, that acts of deprivation of property, *i.e.*, requisitions, properly made and for which receipts have been issued or payment made, are valid and transfer title to the requisitioner upon issuance of such receipt. This view was upheld by

⁵¹ Field Manual 27-10, pars. 337, 338, 339, 340.

⁵² Annual Digest of Public International Law Cases, 1925-1926, Case No. 365.

⁵³ *Ibid.*, p. 479.

⁵⁴ 2 Oppenheim, note, p. 319.

⁵⁵ *Laurent v. Le Jeune*, Annual Digest, 1919-1922, Case No. 843.

⁵⁶ *Ibid.*, p. 482.

the Anglo-German Mixed Arbitral Tribunal which declared that although some coffee requisitioned in Belgium was, contrary to the provisions of Article 52, sent to Germany for the use of the army there, the requisition was not void in international law and that it therefore deprived the plaintiffs of their property there and then.⁵⁷

An illustrative recent case involving the application of the above rules arose as a result of a claim by *B*, a national and resident of Strasbourg, France, for restitution of a motor vehicle in the possession of one *C*, a United States national employed by the Army in Germany. The record indicated that *B*'s motor vehicle had been requisitioned by the German Army from *B* in January, 1944. The notice of requisition stated that the owner would receive payment for the vehicle upon presentation of the receipt which would be given for the property. The vehicle was turned over to the German military authorities, as directed, in June, 1944. *B* was given a receipt therefor by the proper German Army authorities but did not attempt to secure payment from the German Army, although he had ample time (five months) in which to do so before the German forces were driven out of Strasbourg. In April, 1945, the vehicle was captured by the United States forces in a German Army motor pool at Stuttgart, Germany. It was later transferred on a quantitative receipt as captured enemy property to the German traffic authorities, from whom *C* claimed to have derived his title thereto. It was held that title to the motor vehicle was vested in *C* and *B*'s claim for restitution thereof should be denied. Title to the vehicle passed from *B* to the Government of Germany upon requisition and issuance of the receipt, although *B*, who had sufficient time to do so, did not present the receipt for payment. Upon capture by the United States forces title to the vehicle passed from the Government of Germany to the Government of the United States. The transfer of the vehicle by the United States Army to the German traffic authorities passed title to them. Thereafter, through valid sales effected under the pertinent provisions of the German Civil Code, title passed to *C*.⁵⁸

IV—DISPOSITION OF CAPTURED ENEMY PROPERTY

The ultimate disposition of captured enemy property is not a question for international but for domestic law. The United States Constitution provides that the Congress shall make rules concerning captures on land and water.⁵⁹ Under this authority the Congress enacted Articles of War 79 and 80⁶⁰ which provide in pertinent part:

All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States. . . .

⁵⁷ *Tesdorpf v. German State*, Annual Digest, 1923-1924, Case No. 340.

⁵⁸ 8 Bull. JAG (1949) 109.

⁵⁹ Article I, sec. 8, cl. 11.

⁶⁰ Public Law 759, 80th Cong.; 10 U.S.C. 1551.

Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties.

The English rule is that "all booty captured from a hostile nation, whether on sea or land, belongs to the Crown. . . ." ⁶¹ Whenever booty is still admissible and therefore taken, it becomes the property of the state and not of the individual who captures it. The former practice by which booty was sold and the proceeds divided amongst the captors has vanished. ⁶²

Thus in an older case the Judge Advocate General held that the captor government, after capture, had "as full and complete title to captured property as to any of its property otherwise acquired. . . ." ⁶³

In a recent case where a Division Memorial Commission requested that certain enemy property captured by the Division be transferred to the Commission for permanent display in a museum to be built upon the termination of the war, it was held that there was no existing authority under which the War Department could comply with the request, as property captured from the enemy became the property of the United States and could only be disposed of in accordance with Congressional direction. It was further held that the Act of June 7, 1924, ⁶⁴ which authorized and directed the Secretary of War to apportion and distribute pro rata "among the several States and Territories and possessions of the United States and the District of Columbia" certain war trophies captured from the armed forces of Germany, was applicable only to property captured during the period of the first World War, April 7, 1917, to November 11, 1918, and furnished no authority for the distribution of property captured in World War II. ⁶⁵

By virtue of the authority of the war powers of the President and in order to improve the morale of United States forces in theaters of operations, the War Department published Circular 353 on August 31, 1944, which authorized:

. . . the retention of war trophies by military personnel and merchant seamen and other civilians serving with the United States

⁶¹ 6 Halsbury's Laws of England (2d ed.), p. 528.

⁶² War Office, Manual of Military Law, 1929, p. 333.

⁶³ Digest of Opinions of the Judge Advocate General, 1912, p. 1060.

⁶⁴ 43 Stat. 597.

⁶⁵ 3 Bull. JAG (1944) 381.

Army overseas . . . under the conditions set forth in the following instructions. Retention by individuals of captured equipment as war trophies in accordance with the instructions contained herein is considered to be for the service of the United States and not in violation of the 79th Article of War.

2. War trophies will be taken only in a manner strictly consistent with the following principles of international law:

a. Article 6 of the Geneva (Prisoners of War) Convention of 1929 (par. 79, FM 27-10; Ch. 6, TM 27-251 (p. 69)) provides:

All effects and objects of personal use—except arms, horses, military equipment, and military papers—shall remain in the possession of prisoners of war, as well as metal helmets and gas masks.

Money in the possession of prisoners may not be taken away from them except by order of an officer and after the amount is determined. A receipt shall be given. Money thus taken away shall be entered to the account of each prisoner.

Identification documents, insignia of rank, decorations, and objects of value may not be taken from prisoners.

b. Metal helmets and gas masks may be taken from prisoners by the proper authorities when prisoners have reached a place where they are no longer needed for protection.

c. Article 3 of the Geneva (Red Cross) Convention of 1929 (par. 176, FM 27-10; Ch. 7, TM 27-251 (p. 131)) provides:

After every engagement, the belligerent who remains in possession of the field of battle shall take measures to search for the wounded and the dead and to protect them from robbery and ill treatment.

d. The taking of decorations, insignia of rank, or objects of value either from prisoners of war or from the wounded or dead (otherwise than officially for examination and safe keeping) is a violation of international law. There is nothing unlawful, however, in a soldier of our Army picking up and retaining small objects found on the battlefield, or buying articles from prisoners of war, of the sort, which, under the articles quoted, it is unlawful for him to take from a prisoner, the wounded, or the dead. In view of the practical difficulty of determining in a particular case whether an object has been acquired from a prisoner by coercion or otherwise obtained in a manner contrary to international law, commanding officers will take appropriate measures to prevent violation or evasion of either the letter or spirit of the conventions. Under no circumstances may war trophies include any item which in itself is evidence of disrespectful treatment of enemy dead.

3. a. With the exceptions noted in b below, military personnel returning to the United States from theaters of operations may be permitted to bring back small items of enemy equipment which have not been obtained in violation of the articles of the Geneva Convention as quoted in paragraph 2.

b. The following items are prohibited:

- (1) Nameplates. (These will not be removed from captured equipment except by authorized military personnel.)
- (2) Items which contain any explosives.

- (3) Items of which the value as trophies, as determined by the theater commander, is outweighed by their usefulness in the service or for research or training purposes in the theaters of operations or elsewhere, or by their value as critical scrap material.

In connection with the above-authorized retention of captured enemy property as war trophies it is sufficient to point out that such retention was authorized under the pertinent provisions of domestic law, not international law, and that such authorization was in no way a reversion to the older practice approved by Heffter⁶⁶ which looked upon the taking of booty as a right of the individual soldier under international law.

In any attempt to solve the many knotty problems relating to the disposition of captured enemy property, the London Declaration of 1943 cannot be overlooked, for it added substantial difficulties to legal solutions by bringing into the picture the political concept of restitution. By the London Declaration the United States and certain others of the United Nations issued

... formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

Accordingly the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.⁶⁷

The concept of restitution as contained in the Declaration of London would appear to imply that the capture, seizure or requisition of property by an invading army is illegal, that after the fact of such capture, seizure or requisition, title to such property remains vested in the original owner, and that the laws of war by which title to such property is transferred by capture, seizure or requisition are inoperative. While the language of the Declaration would appear to render it easy to make such an inference and while such inferences were made by nations whose property was seized, it is obvious that such inferences had no basis in law. Certainly it would not be maintained on any legal ground that the Declaration of London invalidated or rendered inoperative the unwritten rules

⁶⁶ See note 13, *supra*.

⁶⁷ Department of State Bulletin, Vol. 8, No. 184 (January 2, 1943), p. 21.

of the international law of war or the written rules contained in the Hague and Geneva Conventions.

Based upon the Declaration of London, claims against the United States for the restitution of items of military equipment were made by several foreign governments, including Hungary, Poland, Yugoslavia, Belgium and Norway. Each of these governments assumed that whatever property was seized by the German armed forces was to be considered as "looted" under the terms of the Declaration of London. As much of this equipment was later captured or seized by the United States, it was necessary, in attempting to determine the United States' interest in such equipment, to investigate as fully as possible the facts surrounding the German acquisition of such equipment, and to distinguish between property which could be legally captured or seized or requisitioned under the Hague Regulations by the German armed forces, and property which appeared in fact to have been "looted." As stated above, property captured on the battlefield or legally seized and requisitioned by an army of occupation became the property of the captor government. Under appropriate restitution directives property which was *illegally* seized was considered as "loot" and, if recovered, was restitutable.

Great difficulties, however, arose in the application of these apparently simple principles. In cases wherein it was found that Germany acquired such property as a result of capture on the battlefield or through seizure or requisition under the general rules of international law, applicable as well to Germany and its allies as to the United States and its allies, the determination was made that Germany's title thereto was valid. Under the ordinary rules governing captured property, *supra*, it is usually not necessary for the capturing Power to go behind the fact of seizure or capture by its own forces in order to determine the validity of its own title. However, in these and similar cases, because of the Declaration of London, it was necessary to establish that such captured enemy property had not been "looted" by the German forces.

The case of the captured Hungarian horses is a fair illustration of the difficulties encountered. Certain Hungarian horses, belonging to private and public owners, were taken from Hungary by the retreating German Army early in 1945. Later they were captured in combat by the United States Army on German army farms and were reduced to firm possession. The best of them were brought to the United States for use at the United States Army breeding farms. In 1947 the Hungarian Government requested their return under the provisions of the Declaration of London. The United States Army, believing the horses to be captured enemy property, desired to retain them, while the Department of State, anxious to prove the international good faith of the United States, desired to return the horses to Hungary. After extended hearings before a subcommittee of the Armed Services Committee of the United States Senate,

where all the relevant facts were brought to light, it was finally decided by the Departments of State and Army that the horses were captured enemy property, title to which was vested in the United States, and that such horses could not be sent to Hungary, or otherwise disposed of, without the specific authorization of an Act of Congress.

In conclusion, it is hoped that the material here presented will contribute to an understanding of the legal principles and problems inherent in the expression "captured enemy property." Colonel H. A. Smith stated that it would be for the jurists of tomorrow to determine how successfully we of today have solved in our small part such problems as have been presented for decision.⁶⁸ If this writer, by setting forth the general principles which have been illustrated by recently decided cases, has rendered this subject more understandable and the sources more available, he will have achieved his purpose and will have given the jurists of tomorrow some material upon which their judgment concerning the success of our efforts can be based.

⁶⁸ See note 2, *supra*.

SOME PRINCIPAL ASPECTS OF BRITISH EFFORTS TO CRUSH THE AFRICAN SLAVE TRADE, 1807-1929

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One function of the British Foreign Office has been to promote the universal abolition of slavery, the slave trade, and analogous forms of involuntary servitude.¹ It has been said that "International co-operation for the suppression of the African slave trade was one of the most significant developments of the nineteenth century."² If this is so, it should not be a superfluous task to consider the legal aspects of the principal methods which the prime mover, Great Britain,³ employed to achieve this effect. The literature of international law contains excellent material on certain features of the problem, but little material on the most productive and decisive phases of the policy. The object of this article is to show what those phases were, without dealing with their political side any more than seems absolutely necessary for clarity.

I. THE POLICY AND THE PROBLEM, 1807-1839

In the year 1839 the Government of Great Britain had bilateral conventions in force with nearly all the leading maritime states of the Christian world, extending reciprocal "rights" of search and seizure on the high sea, applicable to vessels suspected on reasonable grounds of being engaged in the African slave trade.⁴ This was a business of moving

¹ Sir John Harris, *A Century of Emancipation* (London, 1933), *passim*; Ellery C. Stowell, *Intervention in International Law* (Washington, 1922), *passim*.

² Manley O. Hudson (ed.), "Suppression of the African Slave Trade," *Cases and Other Materials on International Law* (2d ed., 1936), p. 663.

³ *Ibid.*

⁴ The policy is studied as a whole in Howard Hazen Wilson, "Devices Employed by Great Britain to Suppress the African Slave Trade" (unpublished Ph.D. dissertation, University of Chicago, 1941).

⁵ Listed in Hertslet's *Commercial Treaties* [hereafter cited as *HCT*] (London, 1827-1925), Vol. XXII, pp. 1024-1062. Under some treaties vessels were tried by mixed courts, but under other treaties by courts of their own states (*ibid.*).

In early English and American decisions it had been assumed that the African slave trade, being repugnant to general principles of justice, so far offended against the universal law of society as to warrant the condemnation of all slavers found on the high sea, to whomsoever belonging, in all cases where such commerce was not permitted by the state of the prize (*The Amedie* (1810), 1 Acton's Admiralty Reports 240; *The Fortuna* (1811), 1 Dodson's Admiralty Reports 81; *The Diana* (1813), 1 Dodson's Ad-

human chattels from a land where prisoners of war were slaves,⁶ to a land where slaves were *res*.⁷ She also had many agreements with native governments in the Middle East, permitting a somewhat wider scope of activity against that commerce.⁸

The process of treaty negotiation, which perhaps began in a tentative way as early as 1788,⁹ had required the most strenuous exertion of England's economic and political power. Such exertions were made mandatory upon the government by the peculiar humanitarian zeal of the British anti-slavery movement, which William Wilberforce (1759-1833) and his influential associates had developed into a great political force.¹⁰ In

miralty Reports 95; the United States *v.* the Schooner *La Jeune Eugénie* (1822), First Circuit Court of the U. S., 2 Mason's Reports 409). Cf. Preamble to Anglo-Portuguese convention of Jan. 21, 1815 (British and Foreign State Papers [hereafter cited as *BFSP*] [London, 1841—], Vol. II, p. 345) with Art. 10 of Anglo-Portuguese alliance of Feb. 19, 1810 (*Ibid.*, Vol. I, pp. 555 ff.).

Nineteenth-century positivism prevailed over the naturalistic principles of *The Amedie*. In restoring *The Louis*, a French slaver, Sir William Scott showed that the traffic was not illegal by the test of international custom; and he reaffirmed the principle that all states meet upon a basis of entire equality and independence on the high sea in time of peace and apart from convention. Since there could be no general right of search under such conditions, unless against professed pirates, the slave trade of foreign nations could not lawfully be suppressed by Great Britain except under treaty rights or similar evidence of international consent (*The Louis*, Great Britain, High Court of Admiralty, 1817, 2 Dodson's Admiralty Reports 210). From Justice Story's point of view the condemnation of a slaver of another abolitionist state retroactively justified an otherwise illegal act of search [*La Jeune Eugénie*, *loc. cit.*, pp. 435, 443].) Sir William Scott formally reconciled the opposing philosophies of *The Louis* and *The Amedie* by distinguishing the cases on the ground that France had apparently not prohibited the trade. France promulgated such legislation in the following year after much British remonstrance (William Law Mathieson, *Great Britain and the Slave Trade, 1839-1867* [London, 1929], pp. 9-15). The United States had done so by 1808 (*BFSP*, Vol. LXIV, pp. 1363 ff.). *The Amedie* and *The Fortuna* were American ships. Cf. *Madrazo v. Willes* (1820), 3 Barnwell and Alderson's Reports 353; *Buron v. Denman*, [1848] 2 Exchequer Reports 167; *The Antelope*, U. S. Supreme Court, 1825, 10 Wheaton 66.

⁶ *Ibid.*

⁷ Although the powers that might be exercised over a slave were extremely different in different countries (Lord Mansfield, in *The Case of James Somersett*, a Negro, on a habeas corpus (1772), Howell's State Trials, Vol. XX, col. 79), the right of ownership was the same; for in all civilized countries the slave was regarded as an article of property and secured as such by all the protection of the law (*The Louis*, *loc. cit.*, p. 250). But see further developments *infra*, notes 105, 106. In England *Somersett* was a free man; for the status of slavery was "so odious" that nothing could be suffered to support it but the force of positive law (*Somersett's Case*, *loc. cit.*).

⁸ *Infra*, notes 84-88.

⁹ James Bandinel of the Foreign Office, *Some Account of the Trade in Slaves from Africa as Connected with Europe and America* (London, 1843), p. 114.

¹⁰ *Ibid.*, pp. 67, 70 ff.; Mathieson, *op. cit.*, pp. 2-5 ff.; R. Coupland, *The British Anti-Slavery Movement* (London, 1933), pp. 87-111 *et passim*.

the year 1839, however, there was not in all England a more aggressive and determined enemy of "the diabolical slave traders" than the Foreign Secretary himself, Viscount Palmerston (1784-1865; Foreign Secretary 1830-1841, 1846-1851; Prime Minister 1855-1858, 1859-1865). As he told the House of Commons, if all the guilt of the human race, from the Creation down to the present day, could be lumped together, it could hardly equal that incurred by the men of the odious stamp, who slaughtered or enslaved as many as four hundred thousand Africans each year, chiefly to supply the Brazilian and Cuban markets; and he concluded:

. . . And is it not, then, the duty of every government, and of every nation on whom Providence has bestowed the means of putting an end to this crime, to employ those means to the greatest possible extent? And if there is any government, and any nation upon whom that duty is more especially incumbent, is not that government the government of England, and are we not that nation? Political influence and naval power are the two great instruments by which the Slave Trade may be abolished; our political influence, if properly exerted, is great, our naval power is pre-eminent.¹¹

Ever since Great Britain herself prohibited and abolished this commerce (1807),¹² and embarked in good earnest on a program to rid the world of it, the principal obstacles which she faced were the interests of the United States, Brazil, Portugal, Spain, the Arabs, the African chiefs, and France. The interest of the African chiefs in this business was that of the slave hunter. The interest of the Arabs of Muscat-Zanzibar was the interest of the hunter, exporter, importer, and overseas carrier to the Middle East.¹³ The interest of Spain was that of the Cuban and Puerto Rican planters, and perhaps that of the Havana dealers; but the leading slave importers of all the world were the Brazilians.¹⁴ Again, the rôle of the Portuguese was that of exporter, broker, and overseas carrier, trading from Portuguese East and West Africa and elsewhere to the Brazils; but the hostility of the United States and the coolness of France derived, for the most part, from more far-reaching considerations. France was more coöperative regarding the Transatlantic slave trade, than was the United States before the Civil War; but the forces of national

¹¹ Great Britain, Parliament, House of Commons Debates [hereafter cited as H. C. Debates], Vol. LXXVI, 3d ser., col. 931, July 16, 1844. This figure was based upon British estimates that upwards of 100,000 negroes annually reached the New World alive (*Ibid.*, cols. 924, 930 ff.).

¹² *BFSP*, Vol. V, p. 559; Mathieson, *op. cit.*, pp. 2-5.

¹³ In 1842 James Bandinel estimated that more than 20,000 slaves were being annually exported from the African dominions of the Imam of Muscat (*op. cit.*, p. 302).

¹⁴ Lord Palmerston was confident that as the middle of the century approached, the Brazilian importations were at the rate of at least 70,000 a year (H. C. Debates, Vol. CII, 3d ser., cols. 1334-1341, July 12, 1858). It is said that according to official Brazilian estimates 60,000 were imported in 1848 (Alan K. Manchester, *British Pre-Eminence in Brazil, Its Rise and Decline* [Chapel Hill, 1933], p. 256).

jealousy, whether associated with the humiliating defeat of the French arms (1815), or with the clashing policies of the balance of power,¹⁵ seemed constantly to be at work in the hearts of the French people. Neither did there exist in the French nation, as Lord Palmerston said, "the same feeling about the Slave Trade, which happily prevails in England."¹⁶ In the United States two great causes of opposition were clearly at work. One concerned the freedom of the seas.¹⁷ The other concerned the defense of slavery. Slavery did not become a delicate question in the United States until about 1830.¹⁸ Thereafter the two main causes of American hostility combined to make any true coöperation with Great Britain, by an extension of the conventional powers of search, impossible until the American Civil War.¹⁹

¹⁵ Henry Wheaton, *Histoire des Progrès du Droit des Gens* (3rd ed., 1853), Vol. II, pp. 286 ff.

¹⁶ H. C. Debates, Vol. LXXVI, 3d ser., col. 944, July 16, 1844.

¹⁷ It was the long-established policy of the United States to resist any possible enlargement of the belligerent right of search. Henry Wheaton wrote in 1842 that "the conclusive objection" of the United States to an extension of the right of visitation and search, "... by special compact, in peace or in war, or in any form, and under any restrictions, which have heretofore been proposed, is not merely that it may be liable to abuse, as experience has but too well proved; but that such express recognition might involve by implication the establishment of maxims relating to neutral navigation, the reverse of those which they have ever sought to incorporate into the international code by the general concurrence of maritime states. . . . 'The encroaching character of the right, founded in its original nature as an irresponsible exercise of force,' with its tendency to grow and gather strength by exercise, renders it the more necessary, in their opinion, to be cautious in furnishing fresh precedents of its extension to new objects, and to a larger sphere of operation" (Henry Wheaton, *Enquiry into the Validity of the British Claim to a Right of Visitation and Search of American Vessels Suspected to be Engaged in the African Slave Trade* [Philadelphia, 1842], p. 150). In 1824 the United States concluded a search convention with Great Britain, but when the Senate amended it so as to exclude the "coasts of America" from the zone of search, Foreign Secretary Canning refused to concur (*ibid.*, p. 106).

¹⁸ A. B. Hart, *Slavery and Abolition*, Vol. XVI of *The American Nation: A History* (ed. by A. B. Hart, 28 vols., New York, 1914-1918), pp. 149-241, 256-275, 312.

¹⁹ Speaking generally, after 1830 the so-called "Slave Power of the South" simply put the British Government in a class with the Northern abolitionists, so far as its negrophile policies were concerned. John Caldwell Calhoun, the leading spokesman for that "Power," professed some expectation of a British invasion to destroy slavery in the South (St. George Leakin Sioussat, "John Caldwell Calhoun," *The American Secretaries of State and Their Diplomacy* [New York, 1928], Vol. V, pp. 137 ff.). This was at or about the time that the British Minister at Washington was instructed (1843) to inform the Government of the United States that "Great Britain desires, and is constantly exerting herself to procure, the general abolition of slavery throughout the world," and would rejoice to see it abolished in Texas (Samuel Flagg Bemis, *A Diplomatic History of the United States* [New York, 1936], pp. 228 ff.). In 1838, as Great Britain was commencing to emancipate her slaves in the West Indies, the British Minister at Washington reported to Lord Palmerston that President Jackson appeared to shrink from bringing forward the

In 1839 the status of England's search conventions against the slave trade was most unsatisfactory. Whereas generally speaking, "Brazil's whole trade went on south of the Line,"²⁰ the treaties of search and seizure with Portugal (1817)²¹ and Brazil (1826)²² applied only north of the Line. As to Cuba there was no agreement with Spain clearly extending adequate powers until 1835.²³ After losing many of their ships in 1836, the Havana dealers resorted to the real or ostensible maritime character of Portugal. They did so because the new Spanish treaty provided that the mere possession of specified slave-trading equipment should be *prima facie* ground to condemn a vessel;²⁴ but the existing Portuguese convention, like Spain's original search treaty (1817), practically

question of a search treaty, "from an apprehension of alarming the Southern States" (W. E. Burghardt Du Bois, *The Suppression of the African Slave Trade to the United States* [New York, 1895], p. 142). In 1859 Jefferson Davis, later President of the Confederacy, repudiated "any coincidence of opinion with those who prate of the inhumanity and sinfulness of the trade" (quoted in Mathieson, *op. cit.*, p. 139).

²⁰ Foreign Secretary Palmerston in Great Britain, Parliament, House of Commons, Select Committee on Slave Trade, First Report from the Select Committee on Slave Trade, 272 (Ordered, by the House of Commons, to be Printed, April 18, 1848), p. 17. For minor exceptions see statistics on condemnations in Wilson, cited above, note 4.

²¹ Additional Convention of July 28, 1817, to Anglo-Portuguese treaty of Jan. 22, 1815 (*BFSP*, Vol. XI, p. 689).

Foreign Secretary Canning made it an indispensable condition (Bandinel, *op. cit.*, p. 127) of the Anglo-Portuguese alliance of 1810 that Portugal should undertake to accomplish the "gradual abolition" of her slave trade (Art. 10 of Anglo-Portuguese treaty of Feb. 19, 1810 [*BSFP*, Vol. I, pp. 555 ff.], reaffirmed in the Preamble [*HCT*, Vol. II, pp. 77, 79] and Art. 4 of the Anglo-Portuguese treaty of Jan. 22, 1815 [*BFSP*, Vol. II, p. 353]). By Arts. 1-4 of the latter instrument Portugal would permit slave-trading to be carried on by her own subjects, in her own ships, to her own Transatlantic possessions, and to those only; but it should not be lawful for any of her subjects to carry slaves to any destination from any part of the coast of Africa lying to the northward of the Equator (*HCT*, Vol. II, pp. 75 ff.). By 1820 Portugal was the only maritime Power in the Christian world whose treaties with England permitted such traffic to continue.

²² In order to meet the "single and solé condition" of British recognition of Brazilian statehood (Henry Arthur Smith [ed.], *Great Britain and the Law of Nations* [London, 1932], Vol. I, pp. 186 ff.), Brazil in 1826 assumed the duties and liabilities of the Anglo-Portuguese search convention of 1817 (Arts. 2, 3, Anglo-Brazilian convention of Nov. 23, 1826, *BFSP*, Vol. XIV, pp. 610 ff.) and declared that "... at the expiration of three years, to be reckoned from the exchange of Ratifications of the present treaty, it shall not be lawful for the subjects of the Emperor of Brazil to be concerned in the carrying on of the African Slave Trade, under any pretext or in any manner whatever, and the carrying on of such Trade after that Period, by any person, subject of His Imperial Majesty, shall be deemed and treated as Piracy" (Art. 1, *ibid.*, p. 610). Ratifications were exchanged on March 13, 1827 (*ibid.*, p. 609).

²³ Anglo-Spanish convention of Nov. 30, 1835 (*BFSP*, Vol. XXIII, pp. 343 ff.).

²⁴ H. M. Commissioners at Sierra Leone, "Annual Report, 1836," *BFSP*, Vol. XXV, pp. 15 ff.; H. M. Commissioner at Havana, "Annual Report, 1837," *BFSP*, Vol. XXVI, p. 377; Bandinel, *op. cit.*, p. 232.

forbade seizure unless slaves were found already on board.²⁵ Until France concluded her first and only search treaties of 1831 and 1833²⁶ "there prevailed a most extensive use of the French flag for carrying on the slave trade of other countries."²⁷ Yet a main obstacle to the suppression of the Transatlantic slave trade was the lack of such a convention with the United States.²⁸ After the Anglo-Spanish and the Anglo-Portuguese mixed courts at Sierra Leone refused to recognize the transference of Spanish ships to the Portuguese nationality when both the domicile of the true owner and the vessel's course of trade remained unchanged, the British Commissioners reported that "the slave dealers of all nations are now invoking the protection of the flag of the United States."²⁹

Thus the Transatlantic traffic grew.³⁰ Had there been no search treaties, its volume would have been larger; for seizures and condemnations raised insurance rates on slave ventures, and helped to increase the price of imported slaves.³¹ Between 1819 and 1838 three hundred and four vessels were tried by the courts of mixed commission at Sierra Leone, which was only their principal seat, and nearly all of these vessels were condemned.³²

Progress was slow in the Middle East. Negotiations which commenced in 1812³³ with Seyyid Said, Imaum of Muscat, ended in 1822 with an agreement permitting the British Navy to search his vessels for slaves outside a coastal zone extending northward between Portuguese East Africa and British possessions in India. Vessels found laden with slaves would be seized and condemned by British courts.³⁴ This zone theoretically isolated the Arab trade from the British, French, and Portuguese possessions in the area. Other maritime Arab tribes followed the

²⁵ Anglo-Spanish convention of Sept. 23, 1817 (*BFSP*, Vol. IV, p. 83). Such restrictions were not substantially modified by amendments permitting seizure and condemnation upon "clear and undeniable proof" that slaves *had* been on board before visitation (Explanatory Article of Dec. 10, 1822, to Anglo-Spanish convention of Sept. 23, 1817, *BFSP*, Vol. X, pp. 87 ff.; Additional Article of March 15, 1823 to Anglo-Portuguese convention of July 28, 1817, *BFSP*, Vol. XI, p. 24; Anglo-Dutch Explanatory Article of December 31, 1822, *ibid.*, p. 722; *infra*, note 80).

²⁶ Anglo-French convention of Nov. 30, 1831 (*BFSP*, Vol. XVIII, pp. 642 ff.); Anglo-French supplementary convention of March 22, 1833 (*BFSP*, Vol. XX, pp. 286 ff.).

²⁷ Lord Palmerston in H. C. Debates, Vol. LXXVI, 3d ser., col. 943, July 16, 1844.

²⁸ Cf. Bandinel, *op. cit.*, pp. 280-283.

²⁹ H. M. Commissioners at Sierra Leone, "Annual Report, 1838," *BFSP*, Vol. XXVII, pp. 209, 214.

³⁰ Cf. estimates in Du Bois, *op. cit.*, pp. 142 ff.

³¹ Statistics in Bandinel, *op. cit.*, pp. 232, 288, and H. M. Commissioner at Havana, "Annual Report, 1837," *BFSP*, Vol. XXVI, p. 377.

³² H. M. Commissioners at Sierra Leone, "Annual Report, 1837," *BFSP*, Vol. XXVI, p. 318.

³³ Coupland, *op. cit.*, p. 195.

³⁴ Protocol of Sept. 10, 1822, between Great Britain and Muscat, *HCT*, Vol. III, pp. 266 ff.; cf. *ibid.*, p. 269; further agreement of May 31, 1839, *BFSP*, Vol. XXIX, p. 1109.

Imaum's example.³⁵ Some rulers even agreed that slave traders were mere pirates;³⁶ they accorded the right to land and suppress the traffic on their coasts and rivers;³⁷ and they entered to some extent into defensive alliances to prevent the inter-tribal wars which furnished slaves for export.³⁸ In 1832, however, Seyyid Said moved his court to Zanzibar; and this he made into the one great commercial center of the East African area,³⁹ trading in slaves and ivory.

II. SANCTIONING ACTION AND OTHER DEVELOPMENTS, 1839-1865

The separation of Brazil from Portugal on May 13, 1825,⁴⁰ gave Foreign Secretary Canning the opportunity to warn Portugal that as she

³⁵ *HCT*, Vol. VIII, pp. 794 ff.

³⁶ A treaty of Oct. 23, 1817, with King Radama I of Madagascar declared that slave-trading was a "system of piracy" (*HCT*, Vol. I, pp. 354 ff.). In 1820 by Art. 9 of the General Treaty with the Friendly Arabs (of the Persian Gulf) the carrying off of slaves from Africa or elsewhere and the transporting of them in vessels was "plunder and piracy." Art. 1 defined pirates as "enemies of all mankind," forfeiting both life and goods (*ibid.*, Vol. VIII, p. 794).

Henry Wheaton mentions unsuccessful efforts of the British Government at the post-Napoleonic conferences to promote the international recognition of the slave trade as piracy *jure gentium*, apart from convention (*Histoire*, Vol. II, p. 284). Presumably the result would have been to subject all slavers to the laws of the captor's state and to excuse or even justify the search or seizure of an innocent vessel where there was probable cause of suspicion first shown, thus avoiding responsibility and indemnity for such an error (cf. on extension of *jure belli* doctrine of probable cause to cases of suspected piracy under international law in Quincy Wright, *The Enforcement of International Law Through Municipal Law in the United States* [Urbana, 1916], p. 36). The "doctrine" of probable cause was considered necessarily applicable to international marine torts generally, since the award of damages would rest in the sound discretion of the court in an admiralty case (*The Palmyra* (1827), 12 Wheaton 1, 15-17; *The Marianna Flora* (1826), 11 Wheaton 54 ff.). Whereas the belligerent right of search imports a duty of non-resistance under penalty of confiscation of an otherwise innocent vessel (Green H. Hackworth, *Digest of International Law*, Vol. VII, pp. 201-205), on the high sea in time of peace an innocent vessel suspected of piracy remains legally free to resist such intervention by force, in accordance with the principle of equality explained in *The Louis*. The seizure of the *Louis* was upon probable cause, but resistance was not punishable because the captor had not exercised a "right." On the other hand, the "right of approach" described in *The Marianna Flora* involved no invasion of the national jurisdiction because there was no intention of interfering with the freedom of movement of the vessel approached. Although this vessel had offered armed resistance to the exercise of the right, leading to mutual suspicion of piracy with probable cause for the captors, the latter consented to its release (summarized in Wheaton, *Histoire*, Vol. II, pp. 315-318).

³⁷ Agreement between Great Britain and King Radama I of Madagascar, May 31, 1823 (*HCT*, Vol. III, pp. 242 ff.).

³⁸ Treaty and Proclamation of King Radama of Madagascar, Oct. 23, 1817 (*HCT*, Vol. I, pp. 354 ff.); *ibid.*, Vol. III, pp. 239 ff.

³⁹ Coupland, *op. cit.*, p. 203.

⁴⁰ Preamble to Portuguese-Brazilian treaty of Aug. 29, 1825 (*BFSP*, Vol. XII, p. 674).

had no longer possession of the Brazils, she had no longer "any Possessions, for the supply of which, by Treaty, the Slave Trade was permitted, and all Vessels under her Flag, now trading in Slaves . . . are obviously acting in direct violation of the existing Engagements."⁴¹ After enduring a decade of British protests, Portugal went through the form of prohibiting the slave trade entirely in 1836;⁴² but she successfully resisted all British efforts to negotiate treaty powers of search and seizure for the Southern Hemisphere. Lord Palmerston complained as Foreign Secretary that in the year 1837 ninety-three Portuguese vessels entered the one port of Rio de Janeiro, after landing slaves in the province to which that capital belongs.⁴³ The British Parliament therefore passed an Act in 1839 declaring that all Portuguese and stateless vessels found equipped for the trade could be condemned as if they were British-owned ships.⁴⁴ The vessels of Portugal were not excepted⁴⁵ from this measure until she concluded a satisfactory treaty. The convention of 1842 between Great Britain and Portugal contained an "Equipment Article," two clauses assimilating the traffic to piracy, and clear authorization to seize Portuguese ships south of the Line.⁴⁶ The seizures made under the Act helped to diminish⁴⁷ the slave importations of Brazil only temporarily, since the traders resorted to other flags;⁴⁸ but after the intervention was over Portugal made an effort to enforce her own laws.⁴⁹

When Parliament passed this Act, Lord Palmerston endeavored to justify it legally, and tried to show the other Courts of Europe the precise nature of the problem.⁵⁰ Her Majesty's Government had "two grounds of complaint against Portugal":

. . . The one is, that Portugal does not fulfill with fidelity the stipulations which she had already contracted; and the other is, that she does not contract those further stipulations, which, by Treaty, she has bound herself to adopt. . . .

⁴¹ *BFSP*, Vol. XIV, p. 306; *supra*, note 21.

⁴² Decree of Dec. 10, 1836 (*BFSP*, Vol. XXIV, p. 782).

⁴³ *BFSP*, Vol. XXVII, p. 568. This was almost twice as many known slavers as had entered Havana from Africa under the Portuguese flag in that year (*ibid.*); but see above, note 24.

⁴⁴ Act, 2 & 3 Vict., c. 73, Aug. 24, 1839 (*BFSP*, Vol. XXVII, p. 849).

⁴⁵ Amendment of Aug. 12, 1842 (*ibid.*, Vol. XXXI, p. 355).

⁴⁶ Convention of July 3, 1842 (*HCT*, Vol. VI, p. 626). Art. 1 recognized that the traffic was "piratical," and Portugal agreed to prohibit it forever. In Art. 15 Portugal declared that it was "piracy" and promised to inflict the most severe secondary punishments upon any of her subjects who might engage in it.

⁴⁷ Known Brazilian importations declined by 75% (reports of H. M. Commissioners and H. M. Consul at Rio, July 17, 1843, *BFSP*, Vol. XXXII, p. 157).

⁴⁸ Mathieson, *op. cit.*, p. 23.

⁴⁹ "Report of H. M. Commissioners at Sierra Leone for the Year 1845" (*BFSP*, Vol. XXXV, p. 818).

⁵⁰ *BFSP*, Vol. XXVIII, pp. 566 ff., 686.

The conclusion, which Great Britain draws from hence, is, that she is entitled and compelled to have recourse to her own means, in order to accomplish results which she has a right to obtain. . . .

In disregard of the Xth Article of the Treaty of 1810, she declines to "cooperate with Her Britannic Majesty, by adopting the most efficacious means for bringing about a final abolition of the Slave Trade." In disregard of another part of that same Treaty, she permits her Slave Trade to continue, in parts of Africa, "where the Powers and States of Europe which formerly traded there have discontinued and abandoned it." In violation of the Treaty of January, 1815, she still "permits her flag to be used for supplying with slaves other places than the transatlantic possessions of Portugal." In violation of the IIIrd Article of the Additional Convention of the 28th July, 1817, she absolutely refuses to "assimilate the legislation of Portugal upon Slave Trade with the legislation of Great Britain." In violation of the IIInd Article of that Convention, she seeks to prevent Great Britain from putting down that Slave Trade which, by that Article, both Powers jointly declared to be illicit, namely, the exportation of Slaves in Portuguese vessels, from "ports not possessed or claimed by Portugal, in Africa," and the importation of Slaves in Portuguese vessels, into "ports not in the dominions of His Most Faithful Majesty." In violation of the Separate Article of the 11th September, 1817, she refuses to adopt the provisions of the Convention of the 28th of July, 1817, to that altered state of circumstances, which exists in consequence of the law, which has abolished the Slave Trade in all the dominions of the Crown of Portugal.

She has refused to sign a Treaty, which comprises stipulations indispensably necessary for carrying these various provisions into effect, although urged to do so by Great Britain, during a negotiation protracted for upwards of 4 years; but, on the contrary, she insists upon stipulations, which would render such a Treaty as inefficacious as are her own laws.⁵¹

England contended that her action was distinctly authorized by the terms of existing engagements. As to the area north of the Equator, the Foreign Secretary affirmed that in exchanging ratifications of the treaty of January 22, 1815, Portugal had signed a "Declaration" that the British Government might adopt "the same efficacious means to secure the observance of that prohibition which are commonly used by all civilized nations to vindicate the breach of prohibitive laws of trade in restricted parts."⁵²

⁵¹ *BFSP*, Vol. XXVII, pp. 565, 570 ff. The Separate Article of Sept. 11, 1817, to the Additional Convention of July 28, 1817, to the treaty of Jan. 22, 1815, provided that "As soon as the total abolition of the Slave Trade, for the subjects of the Crown of Portugal, shall have taken place, the two High Contracting Parties agree, by common consent, to adopt, to that state of circumstances, the stipulations of the Additional Convention concluded at London, the 28th of July last; but in default of such alterations, the Additional Convention of that date shall remain in force until the expiration of fifteen years from the day on which the general abolition of the Slave Trade shall so take place, on the part of the Portuguese Government" (*HCT*, Vol. II, p. 121).

⁵² *BFSP*, Vol. XXVII, p. 567.

Lord Palmerston also tried to prove, by an article ⁵³ in the same treaty which is suggestive of the principles of *The Amedie*, that British seizures south of the Equator were conventionally authorized, either because of treaty violations, or because Portugal had finally prohibited the trade in that hemisphere.⁵⁴ His case at least manifested a care for legality.

Meanwhile pressure was put on the African chiefs. We know how Commander Denman, of the *Wanderer*, 12, made his agreement with the Chiefs of the River Gallinas (1840), and destroyed the property of the Spanish slave merchant there, rescuing and liberating his human chattels; how the Commander, now made Captain, was relieved of personal liability toward the Spaniard, by official ratification through Lord Palmerston; and how the Court of Exchequer implied that these deeds, committed by Great Britain on the tribal lands, defied the principles of *The Louis*, being unauthorized by any treaty with Spain. Before this decision (1848),⁵⁵ both the Foreign Secretary and the Queen's Advocate General (Sir John Dodson) apparently thought that a definite written agreement with the "territorial authorities" of West Africa—such as they were—could make Great Britain free, as against the other civilized nations, to exercise the powers of the chiefs to destroy the traffic utterly, by seizing certain property so involved.⁵⁶ England nevertheless settled the problem at the Galinas, "the greatest slave mart north of the Line,"⁵⁷ by the simple expe-

⁵³ Art. 2 of the treaty of Jan. 22, 1815, between Great Britain and Portugal stipulated that the Portuguese Sovereign "binds himself to adopt, in concert with His Britannic Majesty, such Measures as may best conduce to the effectual execution of the preceding engagement [to prohibit slave trading from the coast of Africa north of the Equator] according to its true intent and meaning; and His Britannic Majesty engages, in concert with His Royal Highness, to give such Orders as may effectually prevent any interruption being given to Portuguese ships resorting to the actual dominions of the Crown of Portugal, or to the Territories which are claimed in the said Treaty of Alliance, as belonging to the said Crown of Portugal, to the Southward of the Line, for the purpose of trading in slaves, as aforesaid, during such further Period as the same may be permitted to be carried on by the Laws of Portugal, and under the Treaties subsisting between the two Crowns" (*BFSP*, Vol. XI, pp. 687 ff.; or *ibid.*, Vol. II, p. 352).

⁵⁴ Viscount Palmerston contended that the phrase in Art. 2, "during such further Period," showed that Portugal had recognized some "prior right" of interruption, and that Great Britain had engaged to suspend the exercise of it in return for the engagement of the Sovereign of Portugal to adopt the most effectual measures of prohibiting the trade north of the Equator. Hence the Foreign Secretary concluded that (1) even if Portugal had faithfully fulfilled her treaty duties, Great Britain was now authorized by treaty to seize Portuguese slavers south of the Equator, because the Decree of 1836 [*supra*, note 42] had brought the "further Period" to an end; and (2) even if the Decree of 1836 had not brought the "further Period" to an end, Great Britain was justified in claiming to be released from her engagement to abstain from exercising her "prior right," because Portugal, along with her other broken engagements, had failed to fulfill the consideration promised therefor (*BFSP*, Vol. XXVII, pp. 566-571).

⁵⁵ *Buron v. Denman*, [1848] 2 Exchequer Reports 167; Hudson, *op. cit.*, pp. 699-701.

⁵⁶ Cf. correspondence quoted in *Buron v. Denman*, *loc. cit.*

⁵⁷ Mathieson, *op. cit.*, p. 61.

dient of declaring war against the chiefs, and blockading them. In this way she drove all the European slave traders away from that region (1849).⁵⁸

It was important that all such treaties as these should contain sanctioning clauses.⁵⁹ In 1844, for example, the King and Chiefs of Bonny agreed that if for any reason they did not keep their promise to abolish slave exportations entirely, expelling the white traders and burning the slave-pens, Great Britain should "put down the trade by force" and subject the tribe to "severe acts of displeasure."⁶⁰ Despite the unsettled state of these agreements under international law, a great many of them were negotiated during this decade (1840-1850). They authorized Great Britain to seize and adjudicate slavers found in territorial waters, and they permitted British forces to land, destroy the barracoons, and rescue the captives.⁶¹ In 1844 more than a quarter of the entire British Navy stood off the coasts of West Africa, Brazil, and Cuba,⁶² invoking the new and devastating "Equipment Articles." It appears that from 1839 to 1845 three hundred and forty-six ships were adjudicated in the British Vice Admiralty and mixed courts at Sierra Leone, two hundred and eighty having been captured before any slaves could be got on board.⁶³

With the growing movement of the slave trade to the American flag (1839), British officers redoubled their efforts to prevent the fraudulent usurpation of that flag for the purpose of evading search conventions. Too frequently it happened that the slave ships and other vessels which they visited upon suspicion of statelessness or false colors proved after the event to be genuinely American. As the United States stood for broader neutral rights at sea, and could by no means submit to any application of the belligerent right of search in time of peace, she protested very strongly; and she seemed at first unwilling to admit that such mistakes could be ex-

⁵⁸ "British Notification of the Blockade of the Gallinas . . . London, March 19, 1849," *BFSP*, Vol. XXXVIII, p. 552; Commodore Fanshawe to the Governor of Sierra Leone, Nov. 26, 1849, *BFSP*, Vol. XXXVIII, p. 395.

⁵⁹ Captain Joseph Denman in Great Britain, Parliament, House of Commons, Select Committee on Slave Trade, *op. cit.*, p. 29.

⁶⁰ Treaty with the King and Chiefs of Bonny, Bonny River, June 6, 1844, *BFSP*, Vol. LVII, p. 335. Cf. agreements cited *infra*, note 61, or those listed in *HCT*, Vol. XXII, pp. 209-237.

⁶¹ For the years 1841-1843, see agreements in *BFSP*, Vol. XL, pp. 896-925; for 1846, *BFSP*, Vol. XXXV, pp. 317-322; for 1847-1848, *BFSP*, Vol. XXXVI, pp. 836-874.

⁶² Mathieson, *op. cit.*, p. 124.

⁶³ Cf. data in St. George Leakin Sioussat, "James Buchanan," The American Secretaries of State and Their Diplomacy, *op. cit.*, Vol. V, pp. 316 ff. The Vice Admiralty courts were concerned with stateless vessels (*supra*, note 44). Cuban importations fell from 10,000 in 1844 to 419 in 1846 (Mathieson, *op. cit.*, p. 66). Between 1810 and 1846 about 117,000 slaves were rescued at sea (Coupland, *op. cit.*, p. 179). If the average vessel carried 443 slaves (Lord Palmerston in *BFSP*, Vol. XXVII, p. 568), the equipment provisions had forestalled the embarkation of as many more.

cusable. It was then that Great Britain made her unfortunate claim, that while there is no general right of search on the high sea in time of peace, there is a general right of visitation to examine evidence of national character. It was said in 1843 that the "right" to verify a foreign flag on the high sea existed when there was reasonable suspicion of false colors. Great Britain claimed as a right what the United States could not recognize as a *right*. England's ominous distortion of the doctrine of probable cause and of the principles of *The Louis* was not rectified until 1858, when the United States conceded in principle that where there is reasonable suspicion of false colors and the boarding officer conducts himself with propriety, inflicting no injury and peaceably retiring when aware of his mistake, no nation will make such an act the object of serious reclamation. To this note Great Britain's new government agreed, confessing frankly that no such right as that contended for had ever existed.⁶⁴

The French flag presented potentially the same problem at the same time; but the British Government was able to solve it in an orthodox and legal fashion. In 1845 the French desired their search conventions to be abrogated. In consenting to this the United Kingdom required, however, that parallel naval instructions be issued to the two fleets, setting forth a procedure for verifying national character where there was reasonable suspicion of false colors. According to Article 7 of the convention, these instructions, which were considered necessary for preventing the piratical accompaniments of the trade, were "founded upon" the law of nations; and they seem to be declaratory in intent. They expressly abjured any "right" of visitation under any circumstances.⁶⁵

These factors bore heavily upon the main problem, which was to stop the trade to Brazil; for American ships were deeply involved in that traffic.⁶⁶ The same measures, moreover, which had driven many traders to the American flag, had caused these and others to adopt the Brazilian flag as well.⁶⁷ Great Britain made many attempts to negotiate an adequate

⁶⁴ John Bassett Moore, *A Digest of International Law*, Vol. II, pp. 928-943; Hugh G. Souleby, *The Right of Search and the Slave Trade in Anglo-American Relations, 1814-1862* (Baltimore, 1933), pp. 64, 87, *et passim*; A. P. Newton, "The United States and Colonial Developments," *The Cambridge History of British Foreign Policy, 1783-1919*, ed. by Sir A. W. Ward, and G. P. Gooch (New York, 1922-1924), Vol. II, pp. 247, 251; Art. 8 of Webster-Ashburton treaty of Aug. 9, 1842, between the United States and Great Britain, *HCT*, Vol. VI, p. 859.

⁶⁵ Arts. 8, 11, and Appendices to Anglo-French slave trade convention of 1845, *BFSP*, Vol. XXXIII, pp. 4, 11, 13 ff.; M. G. Rolin-Jacquemyns, "*Quelques Mots sur l'Acte Général de la Conférence de Bruxelles et la Répression de la Traite*," *Revue de Droit International et de Législation Comparée*, Vol. XXIII (1891), pp. 572 ff.

⁶⁶ Du Bois, *op. cit.*, pp. 163, 174, 178; *BFSP*, Vol. XXXV, pp. 342, 532.

⁶⁷ Cf. data in report of H. M. Commissioners at Sierra Leone, Dec. 31, 1845, *BFSP*, Vol. XXXV, pp. 312 ff., and other annual reports by the same officers, especially in *BFSP*, Vol. XXX, p. 700.

treaty with Brazil, applicable to the south of the Line;⁶⁸ but on March 12, 1845, Brazil notified her that under the Separate Article of September 11, 1817, between Great Britain and Portugal,⁶⁹ the right of search would expire on the following day.⁷⁰ The notification was premature, but probably welcome;⁷¹ and Foreign Secretary Aberdeen replied that inasmuch as between the two nations "the Slave Trade has been piracy since the 13th of March, 1830 the stipulations of 1817 are no longer applicable thereto."⁷² On August 8 an Act of Parliament declared that it should be lawful for Her Majesty's High Court of Admiralty to adjudicate any vessel violating the convention of 1826 as if she were a British-owned ship.⁷³

This alone was not enough. Brazil would neither fulfill her engagements in Article 1 nor conclude a new treaty of search. Her importations of slaves only increased.⁷⁴ Early in 1850 Foreign Secretary Palmerston therefore caused British cruisers to be instructed to seize Brazilian slavers in Brazilian territorial waters.⁷⁵ This proved effective. After about a year Brazil began to coöperate. When the British Navy withdrew in 1852 the Brazilian slave trade was practically extinct.⁷⁶ Nevertheless Lord Palmerston kept the Act in force as long as he lived, since he insisted that its repeal would be immediately followed by a resumption of the trade.⁷⁷ In 1858 he estimated in the House of Commons that by stopping the Brazilian slave trade for the last three or four years Great Britain had rescued about two hundred thousand Africans each year from the misery to which they would otherwise have been exposed.⁷⁸

⁶⁸ Wheaton, *Histoire*, Vol. II, pp. 331-342, quoting a Brazilian protest of Oct. 22, 1845.

⁶⁹ *Supra*, notes 51, 22.

⁷⁰ Wheaton, *Histoire*, Vol. II, pp. 331-343.

⁷¹ The fifteen-year period beyond the date of "general abolition," stipulated by the Separate Article, had not yet expired; for, according to Lord Aberdeen (*BFSP*, Vol. XXXIV, p. 697), Brazil had not enacted any prohibitory laws until November, 1831 (*ibid.*, Vol. XX, p. 165) and April, 1832 (*ibid.*, p. 178).

⁷² *Ibid.*, Vol. XXXIV, p. 697. Art. 1 (*supra*, note 22) remained in force because the convention contained no provisions respecting its own duration and because Art. 1 was not concerned with the right of search, but only provided the basis for calculating when the right of search, granted elsewhere in the convention, should expire in accordance with the provisions of the Separate Article of Sept. 11, 1817.

⁷³ Act, 8 & 9 Vict., c. 122, *HCT*, Vol. VII, pp. 51 ff.

⁷⁴ Mathieson, *op. cit.*, p. 131; Manchester, *op. cit.*, p. 256.

⁷⁵ Mathieson, *op. cit.*, p. 131.

⁷⁶ *Ibid.*, pp. 130-135.

⁷⁷ Viscount Palmerston in H. C. Debates, Vol. CLI, 3d ser., cols. 1334-1341, July 12, 1858. The Brazil Slave Trade Repeal Act of April 19, 1869 (32 Vict., cap. 2, *BFSP*, Vol. LIX, p. 400) stated that "the circumstances which led to the passing of the said Act no longer exist, by reason of the cessation of the importation of slaves into Brazil from Africa" (*ibid.*). Following certain preliminary legislation in 1871, Brazil abolished slavery in 1888 (J. Fred Rippy, *The Historical Evolution of Hispanic America* [New York, 1933], pp. 36 ff.).

⁷⁸ H. C. Debates, Vol. CLI, 3d ser., cols. 1334-1341, July 12, 1858. The figure was based upon the conservative assumption that two Africans died on land or sea for each

Lord Aberdeen and Lord Palmerston justified their action on two grounds: (1) that general international law gave a state extreme rights to enforce a violated engagement;⁷⁹ and (2) that Article 1 undoubtedly authorized the assumption of British Admiralty jurisdiction over Brazilian slavers. It was said that while Parliament had as yet gone no further than to sanction a partial exercise of the right which Article 1 conferred, Great Britain was also free to apply the penalties of piracy to the persons of Brazilian subjects who were found to be engaged in the traffic on the high sea. Had Article 1 intended that the penalties of piracy should be inflicted by Brazil alone, other and different words must have been used; "and it was especially incumbent upon Brazil to have taken care of this, as she was the party making the concession,"⁸⁰ for

. . . The very term of piracy would imply, unless it were otherwise stated, that those of their subjects whom the 2 Contracting Parties designated as guilty of that Crime, are placed within the reach of other laws than those of their own country; and although it is admitted that no act of Great Britain and Brazil alone could make the Slave Trade of Brazil, or any other crime, piracy as to other nations, yet it was competent to them to declare, that inter se it should be so treated. This they have done; and the only true construction which the words

one who reached the new world alive, and that Brazil had been importing about 70,000 a year.

⁷⁹ The first clause in Art. 1 (*supra*, note 22), that "it shall not be lawful . . ." imposed a subsisting obligation upon Brazil not merely to forbid the trade, but also to abolish it; and Great Britain had a right to enforce that obligation (Foreign Secretary Aberdeen, *BFSP*, Vol. XXXIV, p. 709). "The Government of Brazil," said Foreign Secretary Palmerston, "cannot but be aware of the nature of the extreme rights which by the law of nations the violation of a treaty engagement gives to the State towards which the engagement is violated; and the Brazilian Government ought to do justice to the moderation which has been displayed by Great Britain in perseveringly forbearing from the exercise of that right" (*BFSP*, Vol. XL, pp. 342 ff.). As Foreign Secretary Palmerston pointed out in February, 1850, the failure of Brazil to deem and treat her slave-trading subjects as pirates was itself a violation of Art. 1, since Brazil had not yet promulgated such a law (*BFSP*, Vol. XXXVIII, p. 471).

⁸⁰ *BFSP*, Vol. XXXIV, p. 708 *et seq.* Lord Aberdeen said that if Great Britain had chosen to hold that right in reserve so long as the search provisions had remained in effect, she was not debarred from exercising it now (*ibid.*).

In *The Queen v. Serva, etc.* (1845, 1 Denison Crown Cases 104, English Reports, Vol. CLXIX, p. 169) the court disregarded the piracy clauses in the Brazilian treaty, looking only to the provisions for search and seizure; but the vessel was seized in February, while these provisions were still in force. For lack of "clear and undeniable proof" (Additional Article of March 15, 1823, to the Anglo-Portuguese convention of July 28, 1817, *supra*, note 25) that slaves had been on board before visitation, and because the procedure of the British officers had not conformed precisely to treaty specifications, Serva and others, who had slaughtered the British prize crew on board the Brazilian slave schooner *Felicidade*, were released for want of British jurisdiction; for "if the lawful possession of that vessel would have been sufficient to give jurisdiction, there was no evidence brought before the court at the trial that the possession was lawful" (English Reports, Vol. CLXIX, p. 191).

of the Article will bear, is, that the Slave Trade of Brazilian subjects shall be deemed and treated as piracy by the 2 Contracting Parties; that is, that the penalties which, by the law of nations, attach to piracy, properly so called, and which every nation may inflict upon pirates, shall, by the Governments of the 2 Contracting Parties, one or both, be inflicted upon the slave traders of Brazil.⁸¹

In her reply Brazil sought to reduce this argument to an absurdity. Identifying ships with territory, she declared that it would be absurd to recognize the right of the British Government to punish Brazilian subjects, in their persons or property, for crimes committed on the territory of the Brazilian Empire, without a very clear, express, and positive delegation of authority. "Where," she asked, "does one find in the treaty this clear and positive delegation?"⁸²

The crushing of the Brazilian slave trade left the United Kingdom free to concentrate upon Cuba; but the strengthening of her naval contingents about those shores was countered in 1858 by the dispatch of an American squadron to those waters, having instructions to protect American shipping against any interference.⁸³ American participation in the slave commerce

⁸¹ The Earl of Aberdeen to M. Lisboa, Aug. 6, 1845, *BFSP*, Vol. XXXIV, pp. 710 ff. Lord Palmerston similarly declared in 1850 that "The British Government has contented itself with exerting an action distinctly authorized by the terms of the treaty of 1826, and falling within the scope of the functions which the Brazilian Government ought itself to have cooperated in performing" (*BFSP*, Vol. XL, pp. 342 ff.).

Cf. other piracy clauses *supra*, notes 36, 46. There were still others. It was usually clear that they did not refer to statutory piracy alone. In some search conventions the parties, after agreeing to prohibit the trade, engaged "to declare such traffic piracy" and "further" declared "that any vessel which may attempt to carry on the Slave Trade, shall, by that fact alone, lose all right to the protection of their flag" (Art. 1 of the "Quintuple Treaty" of 1841, ratified by Great Britain, Austria, Russia, Prussia (*BFSP*, Vol. XXX, p. 269, 272), unratified by France, but acceded to by Belgium in 1848 (*HCT*, Vol. VIII, p. 62)). *Cf.* identical commitments in the Anglo-Texan search convention of March 16, 1840 (*ibid.*, Vol. VI, p. 814). The search treaty with the Argentine Confederation of May 24, 1839 (*ibid.*, p. 117) and the English version of the search treaty with Ecuador of May 24, 1841 (*ibid.*, Vol. VII, p. 201) contained piracy clauses similar to those in Art. 1 of the Anglo-Portuguese convention of 1842. In other search treaties the parties, having engaged in a preceding article to apply the penalties of piracy to slave-trading by their subjects or under their flags, engaged to agree on the details by which they would "immediately and reciprocally" carry "the law of piracy" into execution, "with respect to the vessels and subjects or citizens of each" (Anglo-Bolivian convention, Sept. 25, 1840, Arts. 2, 3, *ibid.*, Vol. VI, pp. 51 ff.; Anglo-Chilean convention, Jan. 19, 1839, *ibid.*, p. 166; Anglo-Uruguayan convention, July 13, 1839, *ibid.*, p. 867). Art. 11 of a Treaty of Friendship and Commerce with the Sultan of Borneo, May 27, 1847, also provided that Great Britain should apply the penalties of piracy to the persons, as well as to the vessels, of slave-trading pirates (*ibid.*, Vol. VIII, p. 86).

⁸² Brazilian protest of Oct. 22, 1845, quoted in Wheaton, *Histoire*, Vol. II, pp. 331-343.

⁸³ Francis Wharton, *A Digest of the International Law of the United States*, Vol. III, p. 145.

of Cuba apparently continued until the American Civil War,⁸⁴ when the main causes of American opposition to a search treaty quickly disappeared. The South was out of the Senate; and the United States, with her extension of the doctrine of continuous voyage,⁸⁵ now stood for broader belligerent rights at sea. On April 7, 1862, she signed the desired convention and joined at last "the great humanitarian procession."⁸⁶

The demise of the Cuban slave trade in the 'sixties, however, has been attributed largely to the psychological effect of President Lincoln's Emancipation Proclamation (1862), which seemed to sound the doom of slavery in the West. As William Law Mathieson says, the Transatlantic slave trade may be said to have died with Lord Palmerston (1865).⁸⁷

In the Arab world British negotiations reached the turning point in 1845 when Seyyid Said agreed to stop the intra-imperial maritime slave trade of Muscat-Zanzibar, consented to the seizure and condemnation of any slavers found in any seas as if they were British ships, and engaged to use his "utmost influence" with all the Chiefs of Arabia, the Red Sea, and the Persian Gulf, to prevent the importation of African slaves into their respective possessions.⁸⁸ Many maritime Arab tribes were prompt to follow the Imaum's example; and the treaties which they now concluded brought to an end the early zonal restrictions upon British powers over the high sea.⁸⁹ Other agreements permitted British warships to exercise their beneficent functions within the territorial waters of Portuguese East Africa and Muscat.⁹⁰

III. SUPPRESSION OF THE ARAB TRADE, 1865-1929

The strengthening of English power and influence in East Africa and the Sudan during the last quarter of the century meant the inevitable strangulation of much of the Arab traffic. Thus at Zanzibar in 1873 the Sultan was moved to pledge the immediate abolition of all his domestic coastal slave trade, all his public markets where imported slaves were bought and sold, and all that vast inland traffic which flowed through his dominions to Muscat and the lands beyond.⁹¹ In the same year Muscat

⁸⁴ Du Bois, *op. cit.*, pp. 178 ff.

⁸⁵ George Grafton Wilson, *International Law* (9th ed., 1935), pp. 363 ff.

⁸⁶ Bemis, *op. cit.*, p. 383; *HCT*, Vol. XI, p. 621.

⁸⁷ Mathieson, *op. cit.*, p. 183.

⁸⁸ Convention of Oct. 2, 1845, between Great Britain and Muscat, *HCT*, Vol. VII, pp. 818 ff.; Act of Sept. 5, 1848, to carry the treaty into effect, *ibid.*, Vol. VIII, p. 753.

⁸⁹ Six Arab treaties of 1847, *ibid.*, pp. 798-802; Act of Aug. 1, 1849, to carry them into effect, *ibid.*, pp. 802-808.

⁹⁰ Agreements of 1847 and 1850 with Portugal, *BFSP*, Vol. XXXVI, p. 589 and *ibid.*, Vol. XL, p. 242; agreement of May 6, 1850, with Muscat, *HCT*, Vol. IX, p. 557.

⁹¹ Treaty of June 5, 1873, between Great Britain and Zanzibar, *HCT*, Vol. XIV, pp. 693 ff.; Supplementary Convention of July 14, 1873, *ibid.*, pp. 695 ff. It was calculated at about this time that about 20,000 slaves were imported into Zanzibar each year

entered into similar engagements;⁹² and within three years the Sultan of Zanzibar even nullified the status of slavery in two of his provinces.⁹³ The conclusion of treaties of search and seizure with Egypt (1877),⁹⁴ Turkey (1880),⁹⁵ and Persia (1882)⁹⁶ nearly completed England's conventional network for the high sea, but it especially remained to draw France into it: for this nation had in the decade of the 'forties extended her sovereignty over a nest of slave-trading pirates, the Comoro Archipelago; and she was now about to assume a protectorate over the island of Madagascar.

The resumption of the European Concert during this period may seem to have offered a favorable opportunity to establish a collective action against the Arab trade, but such was hardly the case. At the Berlin African Conference of 1885 the Powers declared the slave trade contrary to general international law and agreed to help in suppressing slavery in the Conventional Basin of the Congo.⁹⁷ At the Brussels Conference of 1890, which England initiated, some score of states re-affirmed these decisions. They engaged in various ways to suppress the slave trade by land and sea, each Power within its own jurisdiction;⁹⁸ but the delegates of France could not discuss the right of search.⁹⁹ The resulting text on the subject, which ostensibly accorded a right of "visit" but not of "search," limited to the verification of documents and applicable upon reasonable suspicion of either statelessness or slave-trading, was inconsequential, since France refused to ratify it.¹⁰⁰ The nature of the problem which French

from the interior; that about 16,000 of these were being re-exported; and that only about 1,000 of the latter number were being rescued by British cruisers (Coupland, *op. cit.*, p. 212).

⁹² Convention of April 14, 1873, between Great Britain and Muscat, *HCT*, Vol. XIV, p. 414.

⁹³ Proclamation of Jan. 25, 1876, by the Sultan of Zanzibar, *HCT*, Vol. XV, p. 493; Coupland, *op. cit.*, pp. 215-218. After Zanzibar became a British Protectorate (1890) the Sultan abolished the legal status of slavery in 1897 with compensation for slave-owners (*HCT*, Vol. XXIV, pp. 1084 ff.) and decreed total emancipation on June 9, 1909 (*ibid.*, Vol. XXVI, p. 1232).

⁹⁴ *Ibid.*, Vol. XIV, p. 324.

⁹⁵ *Ibid.*, Vol. XV, p. 419.

⁹⁶ *Ibid.*, p. 278.

⁹⁷ Chap. II, Arts. 4, 6, 9, General Act of Berlin, Feb. 26, 1885, *HCT*, Vol. XVII, pp. 66 ff.

⁹⁸ Art. 3 of Ch. I of the General Act of Brussels, *ibid.*, Vol. XIX, p. 282 *et passim*.

⁹⁹ Ed. Englehardt, "*La Conférence de Bruxelles de 1890, et la Traite Maritime*," *Revue de Droit International et de Législation Comparée*, Vol. XXII (1890), p. 607; Thomas N. Barclay, "*Le Droit de Visite, Le Trafic des Esclaves, et la Conférence Anti-esclavagiste de Bruxelles*," *ibid.*, pp. 460-465.

¹⁰⁰ Arts. 42, 45, *HCT*, Vol. XIX, pp. 291 ff. France struck out Arts. 42-61 (A. Merignhac, *Traité de Droit International* [Paris, 1907], Vol. II, p. 521). As amended, the Naval Instructions appended to the Anglo-French slave trade convention of 1845 were still in force (Rolin-Jaequemyns, *op. cit.*, pp. 572 ff.) but they were less comprehensive in that they did not accord the so-called "right," and did not apply upon reasonable suspicion of slave-trading, but only of statelessness (*supra*, note 65). Eng-

expansion had created in the Middle East, as well as the practical legal value of certain other provisions of the Brussels Act which France did ratify, was more fully brought before the world by the well-known arbitration case of the Muscat Dhows (1905). Herein Great Britain finally established her right to require France to refrain from granting her national character to vessels belonging to slave-trading subjects of the Sultan of Muscat, and to abstain from protecting those persons (claimed wrongly as her *protégés*) against the criminal jurisdiction of the Sultan in his own territory.¹⁰¹

Hereafter the Foreign Office was more intensely concerned with casting off the many disguises which had lately developed as slavery and slave-trading in the technical sense were progressively discredited and abolished. Up to the first World War the leading subjects of this kind which absorbed the attention of Sir Edward Grey as Foreign Secretary were the institution of so-called "state-slavery" in the Independent State of the Congo, peonage and other practices in the rubber forests of the Putumayo valley, and the traffic in indentured labor from Portuguese Angola to the island of São Thomé.¹⁰² While he virtually admitted that there was no practical difference in the latter case between the way in which these laborers were acquired and the ways of the old slave trade, he could not regard the system as one of slave-trading; for Portugal had abolished slavery in 1878, and now described her system on the cocoa plantations as one of "contract labor."¹⁰³

In drafting¹⁰⁴ Article 1 of the Geneva Slavery Convention of September 25, 1926, the Government of the United Kingdom provided a means for penetrating such disguises, as follows:

land's existing search conventions remained unaffected (Arts. 54, 22, *HCT*, Vol. XIX, pp. 292, 287), except that by Art. 22 they were to apply only in the conventional zone defined in Art. 21 (*ibid.*, p. 287).

¹⁰¹ "Award of the Arbitration Tribunal appointed to decide on the grant of the French Flag to Muscat Dhows, the Hague, August 8, 1905," *HCT*, Vol. XXIV, pp. 774-781; John Westlake, "The Muscat Dhows," *The Collected Papers of John Westlake on Public International Law* (Cambridge, 1914), pp. 528-530; Ellery C. Stowell and Henry F. Munro, *International Cases* (Boston, 1916), Vol. I, pp. 350-357. In Art. 32 of the Brussels Act France had promised not to grant her flag to vessels owned or fitted out by persons other than her subjects or *protégés* (*HCT*, Vol. XIX, p. 289).

¹⁰² *Supra*, note 1.

¹⁰³ Foreign Secretary Grey in H. C. Debates, Vol. XIX, 5th ser., col. 1589, July 21, 1910; Wilson, *loc. cit.* This conformed to the limitations of the British slave trade laws. *R. v. Casaca* (1880, Privy Council, 5 A. C. 548, 566; Mew's Digest of English Case Law, Vol. XIII, p. 1375) involved such a Portuguese vessel, seized wrongly under those laws in the harbor of Sierra Leone. Cf. *The Ricardo Schmidt*, *ibid.*, Vol. XIX, p. 27.

¹⁰⁴ League of Nations, Question of Slavery, Report Presented to the Sixth Assembly by the Sixth Committee, A.130.1925.VI.Geneva, 1925, p. 1.

1. Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.
2. The slave trade includes all acts involved in the capture, acquisition, or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.¹⁰⁵

The word "any" makes both definitions very broad. They have been considered extensive enough to include (a) *de facto* slavery, or "the treatment of a human being as if he were a chattel,"¹⁰⁶ and (b) the transportation of labor under compulsion.¹⁰⁷ Thus World War I may have begun a new story. At the close of our period (1929) Great Britain informed the Secretary General of the League of Nations that there seemed to be "very little if any wholesale seaborne traffic" to Arabia by *dhow*, "though there are still a few *dhow*-owners who run slaves as a speculative adventure."¹⁰⁸

IV. CONCLUSIONS

We have seen from a legal point of view how Great Britain achieved a high degree of success in her efforts to rid the world of the African slave trade. Her policy was constant, but her methods were somewhat different

¹⁰⁵ League of Nations Treaty Series, Vol. LX (1927), p. 263. On Sept. 1, 1939, this convention was in force between more than forty parties (International Labor Office, The International Labor Code 1939 [Montreal, 1941], p. 857). During the negotiations Sir Frederick Lugard proposed that slave-trading vessels on the high sea be "recognized" in international law as engaged in piracy and liable to penalties as pirate ships (League of Nations, Temporary Slavery Commission, Minutes of the Second Session Held at Geneva, 1925 [C.426.M.157.1925.VI.Geneva, Sept. 1, 1925]). Sir John Harris states that it is the governments of France, Italy, Spain, and Portugal which obstruct, "to this day" (1933), the British effort (*supra*, note 36) to have the slave trade declared piracy under general international law (Harris, *op. cit.*, p. 218).

¹⁰⁶ League of Nations, Slavery: Report of the Advisory Committee of Experts Provided by the Assembly Resolution of September 25, 1931 (C.618.1932.VI), p. 7. See *ibid.*, *passim*, on the status of the African inland slave trade and of virtual as well as legally recognized slavery and slave-trading in many parts of the world at that time. In 1933 there were believed to be about five million "legally-owned" slaves in the world, and attention was then drawn especially to China, Abyssinia, Arabia, and Liberia (Harris, *op. cit.*, pp. 237 ff.).

Art. 11 of the Convention of Saint Germain-en-Laye (Sept. 10, 1919) adopted the *de facto* point of view in its reference to "the complete suppression of slavery in all its forms" (quoted in Hackworth, *op. cit.*, Vol. II, p. 667). By Art. 13 the Parties abrogated the General Act of Brussels *inter se* (*ibid.*).

¹⁰⁷ U. S. Secretary of State Stimson to Minister Francis at Monrovia, June 7, 1929, quoted *ibid.*, p. 671.

¹⁰⁸ Quoted *ibid.*, p. 670. Reference was made, however, to the large traffic in children which was being carried on by pilgrims to Mecca (*ibid.*). Cf. further on these and similar practices and institutions, Harris, *op. cit.*, pp. 236-262 *et passim*.

at different times and places. There were many variations in the nature of the problem, and many changes in the phases of major activity.

Great Britain made international law her great vehicle for crushing this trade. Her methods were many; but all of those which have entered into the foregoing history invoked the general law of nations, or that existing by convention.

A. Suppression Under General International Law

The attempts that were made during the Napoleonic Wars to show through judicial interpretation that the trade was internationally illegal, and that any internationally illegal commerce was under certain conditions liable to confiscation, were politically impracticable in time of peace. To achieve a somewhat similar objective through diplomacy became a traditional feature of the slave-trade policy, but such efforts have not been very productive. Toward the end of the century (1885-1890), after the slave trade on the Atlantic was already extinct, many states were persuaded to declare that they considered the traffic contrary to general international law; but they did not draw from that fact any inferences tending to countenance a general jurisdiction over slave ships on the high sea, apart from convention. The British Government has made some serious attempts to promote the general international recognition of the slave trade as piracy *jure gentium*, apart from convention; but if there would now be more general support for such a view, it had not yet prevailed during the period under consideration.

There was one other device which falls within the domain of the general law, though contrary to it. This was England's temporary aberration, her alarming pretension to verify the flags of foreign vessels as of right. It was the more unhappily conceived in that it seemed to confirm the apprehension of the United States that British methods of suppressing the slave trade were tending to destroy the freedom of the seas.

B. Suppression Under Conventional International Law

The methods which the British Government adopted to suppress this commerce through conventional international law may conveniently be considered with reference to the legal duties and liabilities which foreign states assumed in their treaties, and to the manner in which Great Britain exercised her treaty powers, or took sanctioning action to enforce her treaty rights.

Duties of foreign states. While many nations agreed in the beginning to abolish the trade totally and immediately, it was necessary to compromise with others. These latter countries undertook at first to restrict their nationals to their intra-imperial commerce, to exclude foreigners from it, to confine it to a specified geographical zone, and to abolish the

traffic entirely at some specified or unspecified future date. By further undertakings they agreed in different instances to treat the trade as piracy by their municipal laws, to place restrictions upon their domestic slave markets and their inland traffic, and to confine the grant of their maritime flags to vessels owned or fitted out by their subjects or *protégés*. They engaged to coöperate in exerting diplomatic pressure upon recalcitrant states, and entered into defensive alliances with Great Britain, to prevent inter-tribal slave-raiding wars.

In another type of clause England established the *locus standi* for insisting that Portugal was legally bound to give her such additional treaty powers, and to enact and enforce such further penal laws, as the British Foreign Office might from time to time consider appropriate to the circumstances. Among such engagements were those in which Portugal agreed to adopt the most effective means to suppress the trade, and to assimilate her legislation on slave-trading with that of the United Kingdom.

Liabilities of foreign states. The legal liabilities which foreign states and independent barbarous communities assumed in their treaties with Great Britain may also seem rather extensive. Vessels of treaty parties might be searched on the high seas upon reasonable suspicion, detained for the same cause, and condemned on a *prima facie* basis for their equipment alone. In several instances the ships and nationals of parties to these conventions might even be treated by Great Britain *as if they were* pirates under the law of nations. Barbarous communities must suffer British forces to land, carry off commercially held slaves, and seize vessels and other property used in the trade, for adjudication and condemnation by British courts. If, however, the chiefs and the tribes should fail to keep their abolitionist engagements in the most perfect manner, they were bound by treaty to submit to severe acts of displeasure.

Viewed in this light, the measure in which foreign governments lent their passive coöperation to the British program is very impressive. Still it will be remembered that we have overlooked the devices which Britain employed to negotiate her slave-trade treaties, and that many of these pledges were made for substantial subsidies, or by reason of other inducements.

Sanctioning action. When, however, the Government of the United Kingdom extended her admiralty jurisdiction over Portuguese and Brazilian vessels suspected of treaty violations, she did not rely entirely upon her own contention that she was "distinctly authorized" to do so by the terms of existing engagements. Having looked to general international law for sanctioning rights to enforce her treaty rights, she concluded that under the circumstances she had a right to obtain by her own means the results which she had been promised, the results which Portugal and Brazil would themselves have produced if they had faithfully performed

their treaty duties. She therefore exercised some of the powers which were to have been exercised by the delinquent parties. When she vigorously exerted those powers in the territorial waters of Brazil, she attained those results; the Government of Brazil began to coöperate; and most of the transatlantic slave trade was crushed at once and forever.

Diversity and change. Sanctioning action which was effective in Africa and Brazil was impracticable in Cuba, because of the relationship of that island to the United States. Reciprocity in treaty powers, such as prevailed in the West, was not feasible in much of Africa and the Middle East. Sanctioning clauses took various forms. Piracy clauses which Christian countries adopted were no less useful than engagements of African tribes to submit to severe acts of punishment.

In the decade of the 'thirties search conventions were improved by the inclusion of "Equipment Articles." The effectiveness of this measure created new problems as the slave traders fled from one flag to another. The year 1839 brought a new and vigorous policy of treaty enforcement, a new emphasis upon West Africa, new pressure upon the United States, and a shift in the phase of major activity from the North to the South Atlantic. In the 'sixties, when Cuba was again the center of attention, a change occurred in the nature of the problem. During the century the demand for slaves had risen to a great height. Now it began to decline. The British "blockade" was continued and strengthened, and the trade was made unprofitable to the dealer.

The scene then shifted entirely to the Middle East. The growth of French and English power in that area created new changes in the problem. Increasing attention was given to the regulation or suppression of the slave trade by land, and even to the institution of slavery itself. At last the policy was broadened to cover other and newer forms of injustice to aborigines.

These were the principal methods of a legal character which Great Britain employed to crush that odious species of commerce. They were developed and applied over a long period, and tested under widely varying conditions. They brought the transatlantic slave trade to a premature conclusion; they served to reduce the Arab traffic to imperceptible proportions; and they were the means of rescuing hundreds of thousands of African negroes from slavery or death.

NOTES ON LEGAL QUESTIONS CONCERNING THE UNITED NATIONS

BY YUEN-LI LIANG *

THE FIRST SESSION OF THE INTERNATIONAL LAW COMMISSION: REVIEW OF ITS WORK BY THE GENERAL ASSEMBLY

The Charter of the United Nations provides in Article 13, paragraph 1(a), that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. In order to give effect to this provision, the General Assembly decided to establish a commission of fifteen members and, on November 21, 1947, approved a "Statute of the International Law Commission."¹

The International Law Commission, elected by the General Assembly on November 3, 1948,² held its first session at Lake Success, New York, from April 12 to June 9, 1949. In the course of thirty-eight meetings, the Commission dealt with a variety of questions: (1) Survey of international law and selection of topics for codification; (2) Formulation of the Nürnberg principles and preparation of a draft code of offenses against the peace and security of mankind; (3) Study of the question of international criminal jurisdiction; (4) Ways and means for making the evidence of customary international law more readily available; (5) co-operation with other bodies; (6) Draft Declaration on Rights and Duties of States. The actions taken by the Commission are set forth in a report to the General Assembly.³ Part I of the report refers to all questions

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¹ The text of the Statute is contained in U.N. Doc. A/CN.4/4 (reprinted in this JOURNAL, Supp., Vol. 42 (1948), pp. 1-8).

² For list of members elected, see General Assembly, 3rd Sess., Pt. I, Official Records, Resolutions, p. 6. Of the fifteen members, thirteen took part in the first session of the Commission.

³ U.N. Doc. A/925 (reprinted in this JOURNAL, Supp., Vol. 44 (1950), pp. 1-21). In view of the fairly comprehensive character of this report, it is not intended, for the purpose of the present note, to recapitulate in detail the proceedings of the first session of the International Law Commission. An appraisal of its work is provided by Clyde Eagleton in his editorial comment, "First Session of the International Law Commission," this JOURNAL, Vol. 43 (1949), pp. 758-762. See a severe criticism of the work of the first session by Professor V. M. Koretsky, Member of the Commission, in his article published in the *Sovetskoye gosudarstvo i pravo* (Soviet State and the Law), No. 8 (August, 1949), pp. 12-29, summarized and translated in the Current Digest of the Soviet Press, Vol. II, No. 1 (Feb. 18, 1950), p. 20.

considered by the Commission except the Draft Declaration on Rights and Duties of States. Part II contains the Draft Declaration together with explanatory observations.

At the fourth regular session of the General Assembly in 1949, the report of the International Law Commission was discussed at length in the Sixth Committee. Upon the recommendation of the Sixth Committee, the General Assembly adopted a resolution in which it congratulated the Commission on its work and approved Part I of the report in general. In another resolution, the General Assembly recommended to the Commission that it add the topic of the régime of territorial waters to the three topics of international law to which the Commission had decided to give priority in its work of codification. With respect to Part II of the report of the Commission, the General Assembly adopted a third resolution in which it commended the Draft Declaration on Rights and Duties of States to "the continuing attention of Member States and of jurists of all nations," and referred the Draft Declaration to the Member States for comment.⁴ In the discussions in the Sixth Committee of the General Assembly on the report of the International Law Commission, the selection of topics for codification and the Draft Declaration on Rights and Duties of States aroused the greatest interest. The present note will be confined to these two subjects.

I. THE SELECTION OF TOPICS OF INTERNATIONAL LAW FOR CODIFICATION

The Statute of the Commission lays down an elaborate procedure for the codification of international law.⁵ In embarking upon the task of codification, the International Law Commission conducted a survey of the whole field of international law and selected certain topics for codification. This phase of the work of the Commission formed the subject of considerable discussion in the Sixth Committee.

A. The Question of the Powers of the International Law Commission with respect to the Selection of Topics for Codification

Early in the deliberations of the International Law Commission, the question arose as to whether the Commission had the competence to proceed with the work of codification without awaiting the approval by the General Assembly of topics selected by the Commission. By 10 votes to 3, the Commission decided in the affirmative.⁶ The same question was debated in the Sixth Committee of the General Assembly. While there was general agreement that the General Assembly had the power ulti-

⁴ General Assembly resolutions 373(IV), 374(IV) and 375(IV), adopted on Dec. 6, 1949.

⁵ See Arts. 18, 19, 20, 21, 22 and 23 of the Statute. U.N. Doc. A/CN.4/4.

⁶ See Report of the Commission. U.N. Doc. A/925, paras. 9-12.

mately to approve or disapprove the selection of topics made by the International Law Commission, the Sixth Committee was divided as to this decision of the Commission. Article 18, paragraph 2, of the Statute of the Commission was generally found to be ambiguous. This provides:

2. When the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly.

Some representatives⁷ expressed opinions contrary to the International Law Commission's interpretation of its competence. According to them, Article 18, paragraph 2, of the Statute gave the Commission only a power of initiative in the selection of topics; once the Commission was of the opinion that the codification of a topic was necessary or desirable, it should present a recommendation to this effect to the General Assembly, which would then decide whether or not the process of codification should go forward. In support of this position, the representative of the Soviet Union⁸ pointed out that, under Article 13 of the Charter, the General Assembly was to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. The International Law Commission was but a subsidiary organ of the General Assembly and, as such, it could not proceed with the work of codification on its own initiative. The representative of Poland⁹ expressed the view that the words "its recommendations" in Article 18, paragraph 2, of the Statute could "both grammatically and logically mean only that such recommendations should be confined to the necessity or desirability of dealing with a certain topic." This interpretation was, he said, borne out by the fact that the preparation of drafts and their submission to the General Assembly were dealt with separately in Article 20 of the Statute; the word "recommendations," consequently, did not refer to such drafts. Referring also to the word "recommendations," the representative of the Philippines¹⁰ argued that it implied that the General Assembly had not wished the Commission to have the power to proceed with the codification of selected topics on its own authority. It was further maintained, by the representatives of Argentina¹¹ and Norway,¹² that the approval of the selection of topics was a political function which must be exercised by the General Assembly. The representative of Argentina said that while the Commission, as a body of experts, was fully qualified to determine which of the many topics of international law were "ripe for codification," the General Assembly had to be the final judge of whether the codification of

⁷ These included the representatives of Argentina, China, Czechoslovakia, Norway, Philippines, Poland, Ukraine, Soviet Union and Yugoslavia.

⁸ General Assembly, 4th Sess., Official Records, Sixth Committee, p. 109.

⁹ *Ibid.*, p. 113.

¹⁰ *Ibid.*, p. 108.

¹¹ *Ibid.*, p. 130.

¹² *Ibid.*, p. 114.

such topics was politically desirable. As another argument against the competence of the International Law Commission, it was pointed out by the representatives of the Soviet Union¹³ and Norway¹⁴ that if the Commission were allowed to proceed with the work of codification on topics selected by it, it would be in a position to request the Member Governments to furnish documents relevant to the topics being studied. This would place a heavy obligation on the governments which should have an opportunity to say whether they consider the codification of the topic necessary or desirable. Finally, it was pointed out by the representatives of Czechoslovakia¹⁵ and Argentina,¹⁶ that if the Commission were given the freedom to proceed with the work of codification, there was the danger that its work might be wasted, should the General Assembly, upon being presented with a completed draft, decide that the codification of that particular topic was not, after all, necessary or desirable.

On the other hand, some other representatives¹⁷ took the position that the International Law Commission was competent to proceed with the work of codification on topics selected by it, without awaiting the approval of the General Assembly. It was pointed out by the representative of the United Kingdom¹⁸ that members of the International Law Commission were distinguished and independent experts. They were responsible in the last analysis to the General Assembly, but they were free to carry out their work as they thought fit. Only if the International Law Commission were accepted in that light would it be able to discharge its duties and achieve the fundamental purpose of Article 13, paragraph 1(a), of the Charter. The representative of the United Kingdom further contended that the plural form of the word "recommendations" in Article 18, paragraph 2, of the Statute, indicated that the Commission was empowered to submit to the General Assembly not only a recommendation on whether the codification of a particular topic was necessary or desirable, but also other recommendations containing draft codifications of selected topics. The representative of the United States¹⁹ pointed out that the word "recommendations" referred to the same recommendations, as envisaged in Articles 22 and 23 of the Statute, which the Commission was empowered to submit to the General Assembly together with any final draft of codification. The representatives of Sweden, Brazil and the United Kingdom²⁰ sought to prove the competence of the Commission by reference to paragraph 3 of Article 18 of the Statute, under which the Commission was to "give priority to re-

¹³ *Ibid.*, p. 109.

¹⁴ *Ibid.*, p. 114.

¹⁵ *Ibid.*, p. 123.

¹⁶ *Ibid.*, p. 112.

¹⁷ These included the representatives of Brazil, Canada, Chile, Cuba, Dominican Republic, Ecuador, Egypt, Ethiopia, France, Greece, India, Iran, Lebanon, Mexico, Netherlands, New Zealand, Pakistan, Sweden, United Kingdom and United States.

¹⁸ General Assembly, 4th Sess., Official Records, Sixth Committee, pp. 105, 119.

¹⁹ *Ibid.*, p. 124.

²⁰ *Ibid.*, pp. 118, 182, 119.

quests of the General Assembly to deal with any question." It was maintained that, *a contrario*, in the absence of such requests of the General Assembly, the Commission was free to proceed with its work of codification on selected topics. A narrow interpretation would render the provision of paragraph 3 of Article 18 "meaningless." The representative of India²¹ compared Article 16 of the Statute, governing the progressive development of international law, with Article 18 concerning codification. Whereas under the former the Commission was authorized to undertake a work on the progressive development of international law only at the request of the General Assembly, no provision for a similar requirement was made with regard to codification.

Still another reason was advanced in support of the competence of the Commission. The representative of the United States cited the opinion of one of the members of the International Law Commission, Professor J. L. Brierly, that "the judgment whether the codification of a topic was necessary or desirable could be made only after a thorough study of the topic which involved the application of Article 19 onwards and led inevitably to the 'recommendations' of Article 22."²² It was therefore contended that it was impossible to apply Article 18 without applying Articles 19 to 23 of the Statute. Finally, it was argued by several representatives²³ that there would be a loss of time if the International Law Commission were to convene only to draw up a list of topics and to adjourn to await action by the General Assembly before commencing the work of codification on these topics.

The Sixth Committee of the General Assembly finally resolved the question of the competence of the International Law Commission in regard to the selection of topics for codification by answering in the negative the following question²⁴ submitted by the representative of the Soviet Union:

Is it necessary that the General Assembly should approve the topics recommended by the International Law Commission for the codifica-

²¹ *Ibid.*, p. 123.

²² *Ibid.*, p. 124. For remarks of Professor Brierly, see U.N. Doc. A/CN.4/SR.2, p. 13.

²³ See remarks of representative of France, General Assembly, 4th Sess., Official Records, Sixth Committee, p. 122; remarks of the representatives of the United States, *ibid.*, p. 124; Canada, p. 107; Greece, p. 116; Iran, p. 121; Ethiopia, p. 131; Chile, p. 136.

²⁴ U.N. Doc. A/C.6/L.39. The vote was 9 in the affirmative, 21 in the negative and 16 abstentions. General Assembly, 4th Sess., Official Records, Sixth Committee, p. 143. The Committee rejected also an amendment by the Philippines (U.N. Doc. A/C.6/L.35) to a French draft resolution (U.N. Doc. A/C.6/331/Rev.1), which amendment provided that the General Assembly "authorizes the codification of the three topics recommended by the International Law Commission." The Committee considered that no authorization of the codification of the topics selected by the International Law Commission was necessary. See remarks of the representatives of the United Kingdom, Cuba and France, General Assembly, 4th Sess., Official Records, Sixth Committee, p. 144. The vote on the Philippine amendment was 10 for, 27 against, with 10 abstentions. *Ibid.*, p. 145.

tion of international law so that the Commission could pursue its work in the field of the selected topics in accordance with Articles 18-22 of its Statute?

B. Topics of International Law Selected for Codification

1. *Topics selected by the International Law Commission*

As recorded in its report,²⁵ the International Law Commission reviewed consecutively twenty-five topics of international law and drew up a provisional list of fourteen topics selected for codification. It was understood that this list was only provisional and that additions or deletions might be made after further study by the Commission or in compliance with the wishes of the General Assembly.

Out of the fourteen selected topics the Commission decided to give priority to three topics, namely, (1) law of treaties, (2) arbitral procedure and (3) régime of the high seas. Each of these three topics was entrusted to a *rapporteur*, elected by the Commission from among its members, who was to submit a working paper to the Commission at its next session. In addition, the Commission also invited another of its members to prepare a working paper on the right of asylum, although the Commission had not given that topic priority for codification.

2. *Topics suggested by delegations*

In the course of the discussion in the Sixth Committee of the General Assembly, the decisions of the International Law Commission with regard to the selection and priority of topics received general approval.²⁶ Some members, however, expressed a wish to have some other topics given priority as well. Thus the representative of Cuba²⁷ expressed regret that the Commission had not given priority to such subjects as nationality and statelessness, the right of asylum and the recognition of states. The representative of Canada²⁸ stated that his delegation would like to see the questions of diplomatic immunities and consular immunities studied as soon as possible. The representative of The Netherlands²⁹ felt that the Commission should reconsider its decision of not selecting as a topic the laws of war. The representative of Lebanon announced in the Sixth Committee that his delegation attached great importance to the questions

²⁵ Report of the Commission, U.N. Doc. A/925, Pt. I, Chap. II, para. 15-23; this JOURNAL, Supp., Vol. 44 (1950), pp. 5-8.

²⁶ Representatives who spoke in approval were those of Canada, China, Cuba, Ecuador, Egypt, Ethiopia, France, Iran, Lebanon, Mexico, Netherlands, Norway, Pakistan, Soviet Union, Venezuela and Yugoslavia.

²⁷ General Assembly, 4th Sess., Official Records, Sixth Committee, p. 120.

²⁸ *Ibid.*, p. 107.

²⁹ *Ibid.*, p. 113. The representatives of China and Canada took a similar position. *Ibid.*, pp. 133, 107.

of succession of states and governments, diplomatic and consular intercourse, and immunities and responsibility of states. In a plenary meeting of the General Assembly he expressed the hope that the Commission would also give priority to the question of recognition of states and governments.³⁰ As none of these suggestions of delegations took the form of proposals, neither the Sixth Committee nor the General Assembly took any decision with regard to them.

3. *The Selection of an Additional Topic: Régime of Territorial Waters*

The Sixth Committee, on the other hand, adopted a draft resolution proposed by the representative of Iceland,³¹ to recommend to the International Law Commission "to include the régime of territorial waters in its list of priorities." In submitting his proposal, the representative of Iceland stated that since the International Law Commission had given priority to the topic of the régime of the high seas, it was essential that it should take up also the subject of the régime of territorial waters. The two subjects were only two aspects of the same problem; it was impossible to deal with the régime of the high seas without at the same time studying the question of territorial waters.

The proposal of Iceland was opposed by the representative of the United Kingdom.³² He pointed out that, in selecting the three priority topics, the International Law Commission could not have overlooked the reasons given by the representative of Iceland. "No question in international law was more controversial than the régime of territorial waters; the failure of the Hague Conference in 1930 was sufficient proof of that."

³⁰ *Ibid.*, p. 117; General Assembly, 4th Sess., Official Records, Plenary Meetings, p. 538. The representative of Yugoslavia suggested as topics for codification, diplomatic immunity and the recognition of states, see General Assembly, 4th Sess., Official Records, Sixth Committee, p. 125. The representative of Venezuela regretted that the question of domestic jurisdiction had not been included in the provisional list of selected topics, *ibid.*, p. 118.

³¹ U.N. Doc. A/C.6/L.37. General Assembly, 4th Sess., Official Records, Sixth Committee, p. 134. The draft resolution of Iceland was adopted by 15 votes to 12, with 14 abstentions. *Ibid.*, p. 145. At a subsequent meeting of the Sixth Committee, the representative of the United Kingdom moved the reconsideration of this decision on the ground, among others, that the vote had been taken hastily when one-third of the members of the Committee were absent and that only one-fourth of the membership of the Committee voted for the draft resolution. When his motion was put to the vote there were 21 for, 13 against, with 14 abstentions. As, according to the rules of procedure, a proposal already adopted could not be reconsidered at the same session of the General Assembly unless the Committee, by a two-thirds majority, so decides, the motion of the United Kingdom was lost. *Ibid.*, pp. 157-158. The resolution as adopted by the Sixth Committee was submitted to the plenary meeting of the General Assembly and was finally adopted by 32 votes to 8, with 8 abstentions. General Assembly, 4th Sess., Official Records, Plenary Meetings, p. 549.

³² *Ibid.*, p. 136.

He added that his government and that of Norway had decided to submit the dispute between them on that subject to the International Court of Justice. It would, therefore, seem preferable for the International Law Commission to await the Court's decision before taking up the subject.

4. Proposal for the Selection of the Topic of International Rivers

The representative of Pakistan proposed to add another topic to the list of priorities of the International Law Commission. He suggested that the General Assembly recommend that the International Law Commission examine the subject of international rivers "at an early convenience with a view to its possible inclusion in the list of topics for codification."³³ After some discussion of the question, in the course of which some amendments were submitted, the Chairman of the International Law Commission, Professor Manley O. Hudson, who had been invited to take part in the discussion in the Sixth Committee on the report of the Commission, stated that "the Commission would give due consideration to the official records of the Sixth Committee's proceedings, and examine the question of international rivers at its earliest convenience." Thereupon, the representative of Pakistan declared himself satisfied with the assurance given by the Chairman of the International Law Commission, and withdrew his proposal.³⁴

II. CONSIDERATION OF THE DRAFT DECLARATION ON RIGHTS AND DUTIES OF STATES

In Part II of its report the International Law Commission submitted to the General Assembly a Draft Declaration on Rights and Duties of States together with explanatory observations. The Draft Declaration was prepared by the Commission in pursuance of a resolution of the General Assembly, which instructed the Commission to take as a basis of discussion the Draft Declaration on the Rights and Duties of States presented by Panama and to take into consideration other documents and drafts on the subject.³⁵ As related in its report, the Commission took into account certain guiding considerations in the preparation of the Draft Declaration. It was felt that the Draft Declaration should be in harmony with the provisions of the Charter of the United Nations; that it should be applicable to sovereign states only; that it should envisage all

³³ This was a revised text submitted by Pakistan. See General Assembly, 4th Sess., Official Records, Sixth Committee, p. 154. The original draft resolution was contained in U.N. Doc. A/C.6/L.42.

³⁴ General Assembly, 4th Sess., Official Records, Sixth Committee, p. 156.

³⁵ General Assembly resolution 178(II), adopted Nov. 21, 1947. See General Assembly, 2nd Sess., Official Records, Resolutions, p. 112. For Panamanian draft, see U.N. Docs. A/285 and A/285/Corr.1. The Secretary General submitted to the Commission a detailed memorandum on this subject. U.N. Doc. A/CN.4/2.

the sovereign states of the world and not only the Members of the United Nations; and that it should embrace certain basic rights and duties of states.

In conformity with these considerations the Commission restricted its draft to fourteen articles.³⁶ Of the fourteen articles in the Draft Declaration, four define rights of states and ten deal with duties of states.

A. Procedure Followed by the International Law Commission

When the Draft Declaration was considered in the Sixth Committee of the General Assembly, the representative of the Byelorussian Soviet Socialist Republic³⁷ expressed the view that the Draft Declaration had been presented by the International Law Commission to the General Assembly "in violation of Articles 16, 21 and 22 of the Statute of the Commission," and therefore should not be considered by the Sixth Committee. Under the Statute, the Commission, after considering a draft to be satisfactory, must request the Secretary General to issue it as a Commission document and to give it the necessary publicity. The Commission must request governments to submit comments on this document within a reasonable time, and to prepare, in the light of those comments, a new draft for presentation to the General Assembly. As the Commission had not done any of these, the Draft Declaration could not be considered. Following the same line of reasoning, the representative of Poland³⁸ subsequently made a formal motion to the effect that "the Draft Declaration should be referred to Governments for comments and observations, and that it should not be discussed by the Sixth Committee in the absence of those comments and observations."

The International Law Commission had given special consideration to the question of the procedure to be followed with respect to the Draft Declaration, and in particular to the question of whether or not the latter should be submitted immediately to the General Assembly. The Commission came to the conclusion that the Draft Declaration constituted a special assignment from the General Assembly, and that it was competent to adopt in relation to this task such a procedure as it deemed conducive to the effectiveness of its work. Consequently, it had decided to submit the Draft Declaration directly to the General Assembly.³⁹ The representative of Cuba⁴⁰ spoke in favor of the position taken by the

³⁶ For text of the Draft Declaration, see Report of the Commission, U.N. Doc. A/925, pp. 7-9; this JOURNAL, Supp., Vol. 44 (1950), p. 15. See critical remarks by Kelsen, this JOURNAL, Vol. 44 (1950), pp. 259-276.

³⁷ General Assembly, 4th Sess., Official Records, Sixth Committee, pp. 165, 166.

³⁸ *Ibid.*, pp. 168, 169.

³⁹ Report of the Commission, U.N. Doc. A/925, p. 10; this JOURNAL, Supp., Vol. 44 (1950), p. 21.

⁴⁰ General Assembly, 4th Sess., Official Records, Sixth Committee, p. 168.

International Law Commission, and the representative of Iran declared that the Draft Declaration on Rights and Duties of States appeared on the agenda of the Sixth Committee by virtue of a decision of the General Assembly, that the Committee was duty bound to consider it and that the Polish motion ran counter to the decision of the General Assembly. On his proposal, the Sixth Committee declared the Polish motion⁴¹ out of order.

B. Proposed Amendments to the Draft Declaration

Various amendments were submitted to the Draft Declaration by various delegations, and one, the Delegation of Yugoslavia, submitted an entirely new draft declaration.⁴² The Sixth Committee, however, took no action on them, for it had decided not to go into a detailed analysis of the Commission's Draft Declaration. Nevertheless, it may be of interest to mention some of the more salient amendments.

The representative of China⁴³ proposed to delete Article 7 of the Draft Declaration, which stipulates that "every State has the duty to ensure that the conditions prevailing in its territory do not menace international peace and order." He further proposed to add some new articles. One of them was to the effect that "every State has the duty to condition the employment of force by the dictates of humanity and, in consequence, to refrain from cruelty towards enemy persons and attacks directed at enemy civilian population." In addition, he also proposed three other new articles designed to curb external pressure and propaganda. The delegations of Argentina⁴⁴ and Cuba⁴⁵ each proposed the addition of an article which would declare illegal the use of coercive measures of an economic and political character, designed to force the will of another state. The Delegation of Cuba also proposed, *inter alia*, to add a new article on the right of asylum.⁴⁶

During the course of the discussion, several representatives⁴⁷ expressed objections to the principle contained in Article 14 of the Commission's Draft Declaration to the effect that "the sovereignty of each State is sub-

⁴¹ *Ibid.*, pp. 170, 172. The vote on the Iranian proposal was 15 for, 10 against, with 25 abstentions.

⁴² U.N. Doc. A/C.6/326.

⁴³ U.N. Doc. A/C.6/L.4. Also General Assembly, 4th Sess., Official Records, Sixth Committee, p. 188.

⁴⁴ U.N. Doc. A/C.6/L.9. See also General Assembly, 4th Sess., Official Records, Sixth Committee, p. 199.

⁴⁵ U.N. Doc. A/C.6/L.25. See also General Assembly, 4th Sess., Official Records, Sixth Committee, p. 202.

⁴⁶ U.N. Doc. A/C.6/L.25. See also General Assembly, 4th Sess., Official Records, Sixth Committee, pp. 202, 203.

⁴⁷ Byelorussian Soviet Socialist Republic, *ibid.*, p. 165; Chile, *ibid.*, p. 216; Mexico, *ibid.*, p. 180; Soviet Union, *ibid.*, p. 229.

ject to the supremacy of international law." The representative of the Soviet Union declared that the theory of the supremacy of international law was "purely doctrinal, both erroneous and dangerous" and was "an out-moded theory which ran counter both to progress and to the principles of the Charter."

C. The Question Whether the General Assembly Should Adopt the Draft Declaration

1. *Difficulties in the way of adopting the Draft Declaration*

In the course of the general discussion in the Sixth Committee on the Draft Declaration, some delegations urged that the General Assembly should adopt the Draft Declaration with such amendments as may be necessary. Some other delegations were opposed to this course.

The representative of Israel⁴⁸ pointed out a number of what he termed "contradictions" in the Draft Declaration. In the first place, a declaration adopted by the General Assembly could not have binding force. Yet the Draft Declaration used the expressions "every State has the right . . ." and "every State has the duty. . . ." There was, therefore, "a contradiction between the non-legal form of the document and its legal contents." In the second place, he queried, "how could the General Assembly legislate for non-members?" Article 10 of the Charter could be interpreted as limiting the recommendations of the General Assembly to Members of the United Nations and to the Security Council, and it was open to question whether the Draft Declaration could be put into the framework of Article 2, paragraph 6, of the Charter. The third contradiction, according to the representative of Israel, "was that created by the International Law Commission between the Charter and the proposed Declaration." Some articles in the Draft Declaration repeated provisions of the Charter, while others incorporated, in different language, principles embodied in the Charter. He asked: "What was to be gained by the reformulation of those principles in a document of lower legal hierarchy?" He reiterated the doubt previously expressed by the Government of Sweden in 1947, "as to the wisdom of thus establishing a double series of partly overlapping rules. Such a procedure is apt to lead to doubts and difficulties of interpretation in the future."

The difficulties of formulating basic rights and duties of states were also stressed by some representatives who thought that the Draft Declaration contained principles which had not yet formed part of positive international law. Among these principles were, according to the repre-

⁴⁸ *Ibid.*, pp. 180-183. See also comments by Kelsen, *loc. cit.*

sentative of France,⁴⁹ Articles 4, 5 and 7 of the Draft Declaration. He added that Article 5 of the Draft Declaration providing for "equality in law" differed from Article 2, paragraph 1, of the Charter, which referred to "sovereign equality."

Difficulties such as these seem to have inspired a feeling of caution in the Sixth Committee and deterred it from recommending the immediate adoption by the General Assembly of a declaration.

2. "*Commendation*" of the Draft Declaration to Member States and Jurists

Early in the consideration of the question, the Delegation of the United States submitted a draft resolution⁵⁰ providing that the General Assembly should deem the Draft Declaration "a notable and substantial contribution towards the codification and the progressive development of international law" and should "commend" it to the "continuing consideration of Member States, of international tribunals and jurists of all nations as a source of law and as a guide to its progressive development." The Argentine Delegation presented another draft resolution⁵¹ which stipulated that the General Assembly "notes" the Draft Declaration "which it regards as a substantial contribution towards the progressive development of international law and its codification." In addition, it proposed to transmit the Draft Declaration to Member States and institutions engaged in the study of international law, and to request them to furnish their comments and suggestions to the International Law Commission. The Commission, in turn, would be directed "to submit a Draft Declaration on the Rights and Duties of States, taking into account the observations received," for the consideration of the General Assembly at its fifth regular session. The draft resolutions of the United States and Argentina were later superseded by a draft resolution presented jointly by the delegations of Argentina, The Netherlands and the United States,⁵² which became the basis of subsequent discussions in the Committee on the Draft Declaration.

The United States draft resolution had proposed to commend the Draft Declaration to the continuing consideration of Member States, international tribunals and jurists of all nations "as a source of law and as a guide to its progressive development." The joint draft resolution would commend the Draft Declaration "as a guide to international law and to its progressive

⁴⁹ *Ibid.*, p. 196. Art. 4 relates to the duty to refrain from fomenting civil strife in the territory of another state; Art. 5 provides for the right of equality in law; and Art. 7 stipulates that every state has "the duty to ensure that conditions prevailing in its territory do not menace international peace and order."

⁵⁰ U.N. Doc. A/C.6/330.

⁵¹ U.N. Doc. A/C.6/332.

⁵² U.N. Doc. A/C.6/L.50.

development." The expressions "as a source of law" and "as a guide to international law" gave rise to considerable discussion.

Those representatives who advocated the use of the term "source of law" hoped that the General Assembly would note the Draft Declaration as an important contribution to the sources of existing law, and as an authoritative statement of the principles of law on the subject. This point of view was maintained by the representative of India⁵³ who affirmed that the Draft Declaration could provide a source of international law to which governments, international tribunals and jurists might have recourse for the solution of questions pertaining to the rights and duties of states. The representative of the United States⁵⁴ made it clear, however, that the term "source of law" had been used in the sense of Article 38, paragraph 1(d), of the Statute of the International Court of Justice, namely, as a subsidiary means for the determination of the rules of law.

The term "source of law" was opposed by various delegations for a variety of reasons. The representative of Mexico⁵⁵ said that the term was ambiguous, as "it could be taken to mean either a formative process or the creation of law or even the final document." The representative of Israel⁵⁶ pointed out that the sources of international law had been exhaustively listed in Article 38 of the Statute of the International Court of Justice; declarations did not appear in that list unless it was suggested that declarations should be considered under paragraph 1(d) of that article on subsidiary sources. The representative of France⁵⁷ found it difficult to consider the Draft Declaration as an auxiliary means for the determination of rules of law analogous to the "teachings of the most qualified publicists of the various nations." He pointed out that, while the International Law Commission counted among its members some of the world's greatest jurists, the Draft Declaration was not the reflection of their teachings but a synthesis of their opinions. The representative of Poland⁵⁸ said that even if the Draft Declaration were to be considered as the teachings and writings of eminent jurists under Article 38, paragraph 1(d), these writings could never be regarded as a source of law, but could only serve as a subsidiary means for the determination of the rules of law, that is, as evidence of what was or was not law when other evidence was unavailable.

The term "guide to international law" which appeared in the joint draft resolution also met with some disapproval. The representative of Israel⁵⁹ wondered in what sense and in what circumstances the governments would be guided by the Draft Declaration: "Was it intended to make up for omissions in international law, to serve as a guide in the interpretation of international law, in its application or in its future development?"

⁵³ General Assembly, 4th Sess., Official Records, Sixth Committee, p. 190.

⁵⁴ *Ibid.*, p. 167.

⁵⁵ *Ibid.*, p. 181.

⁵⁶ *Ibid.*, p. 246.

⁵⁷ *Ibid.*, p. 248.

⁵⁸ *Ibid.*, p. 196.

⁵⁹ *Ibid.*, p. 245.

The Sixth Committee rejected the provision to commend the Draft Declaration as a source of law.⁶⁰ The Committee adopted also a Polish amendment which, in effect, deleted the reference to "guide to international law and to its progressive development," contained in the joint draft resolution.⁶¹

The resolution as finally adopted by the General Assembly provides that the General Assembly:

1. *Notes* the Draft Declaration on Rights and Duties of States prepared by the International Law Commission and expresses to the Commission its appreciation for its work on the Draft Declaration;
2. *Deems* the Draft Declaration a notable and substantial contribution towards the progressive development of international law and its codification and as such commends it to the continuing attention of Member States and of jurists of all nations.

3. *Reference of the Draft Declaration to Member States for Comments*

The joint draft resolution proposed that the General Assembly should transmit the Draft Declaration to Member States and institutions engaged in the study of international law for consideration and request them to furnish their comments and suggestions.⁶² Since a majority of the members in the Sixth Committee were agreed that the General Assembly should not adopt a Draft Declaration at its present session and since the Committee had indeed refrained from discussing amendments to the text of the Draft Declaration, the suggestion to transmit the Draft Declaration to Member States gained general acceptance.

The Committee, however, decided, upon a motion by Venezuela, to delete the reference to "institutions engaged in the study of international law," on the ground that the scientific stage of the work in connection with the Draft Declaration had been completed and that the General Assembly had only the views of the governments to consider in order to take the purely political decisions.⁶³ On the other hand, the Committee rejected an amend-

⁶⁰ *Ibid.*, p. 250. This motion was made by the representative of Cuba in the form of an amendment (U.N. Doc. A/C.6/L.55) to the joint Argentine, Netherlands, United States draft resolution. The Cuban motion was rejected by 24 votes to 12, with 14 abstentions. At the 270th plenary meeting of the General Assembly, the Cuban Delegation again moved an amendment to commend the principles formulated in the Draft Declaration as a source of international law. This amendment was rejected by 22 votes to 11, with 15 abstentions. U.N. Doc. A/1213. See General Assembly, 4th Sess., Official Records, Plenary Meetings, pp. 537-549.

⁶¹ *Ibid.*, p. 250. The original Polish amendment is in A/C.6/L.59. The vote was 38 to 11, with 4 abstentions.

⁶² U.N. Doc. A/C.6/L.50, 7th par.

⁶³ See General Assembly, 4th Sess., Official Records, Sixth Committee, pp. 195, 251. The vote to adopt the Venezuelan motion was 20 to 16, with 14 abstentions, *ibid.*, p. 264.

ment, jointly proposed by Chile and Colombia,⁶⁴ to transmit the comments of Member States to the International Law Commission.

The text of the paragraph, as adopted by the Sixth Committee, read as follows:

3. *Resolves* to transmit to Member States, for consideration, the Draft Declaration together with all the documentation relating thereto produced during the present session of the General Assembly, and to request them to furnish their comments and suggestions at the latest by 1 July 1950.

Upon the proposal of the representative of Australia, the Sixth Committee further adopted⁶⁵ the following new paragraph:

4. *Requests* Member States to furnish at the same time comments on the following questions:
 - (a) Whether any further action should be taken by the General Assembly on the Draft Declaration;
 - (b) If so, the exact nature of the document to be aimed at and the future procedure to be adopted in relation to it.

With respect to the comments and suggestions furnished by Member States, the joint proposal had provided that the Secretary General should publish them "for such use as the General Assembly may find desirable." Upon an amendment proposed by Chile and Colombia, the Sixth Committee decided to add to the end of the clause the words "at its next session,"⁶⁶ in order to make consideration of the Draft Declaration imperative at the fifth session of the General Assembly. This added phrase was, however, deleted at the plenary meeting, upon adoption of a Danish amendment.⁶⁷

As adopted by the General Assembly, the paragraph reads as follows:

5. *Requests* the Secretary-General to prepare and publish the suggestions and comments furnished by Member States, for such use as the General Assembly may find desirable.

The Committee finally adopted a last paragraph⁶⁸ providing:

⁶⁴ *Ibid.*, p. 283. The vote to reject was 26 to 12, with 8 abstentions. For text of amendment, see U.N. Doc. A/C.6/L.56.

⁶⁵ The vote was 34 to 11, with 5 abstentions. General Assembly, 4th Sess., Official Records, Sixth Committee, p. 264. The proposal adopted was U.N. Doc. A/C.6/L.64, being a revised version of an earlier amendment by the same delegation, A/C.6/L.58. The scope of comments under par. (b) may be visualized by reference to the earlier amendment which further requested the Member States to specify whether the nature of the instrument should be "(a) a restatement by experts of existing international law; (b) a convention; (c) a declaration to be proclaimed by the General Assembly as the standard of international conduct."

⁶⁶ The vote for the amendment was 29 to 9, with 14 abstentions. The paragraph as amended was adopted by 36 votes to 3, with 12 abstentions. General Assembly, 4th Sess., Official Records, Sixth Committee, p. 270.

⁶⁷ *Ibid.*, Plenary Meetings, p. 549. The vote for the Danish amendment was 19 to 15, with 14 abstentions.

⁶⁸ *Ibid.*, Sixth Committee, p. 271. The vote was 48 to none, with 3 abstentions.

6. *Directs* that the text of the Draft Declaration be annexed to the present resolution.

The joint draft resolution as a whole was adopted by the Sixth Committee by 39 votes to none, with 10 abstentions.⁶⁹ It was submitted to the General Assembly and, subject to the amendment to the penultimate paragraph referred to above, the draft resolution recommended by the Sixth Committee was, after a brief discussion, adopted by the General Assembly at the 270th plenary meeting, on December 6, 1949,⁷⁰ by 30 votes to none, with 12 abstentions.

The progressive development and codification of international law are, of necessity, time-consuming processes. The International Law Commission has, nonetheless, embarked upon its work with earnestness and has made a definite, if necessarily modest, beginning in its task. Deservedly, it has won the appreciation of the General Assembly.

The Commission is a subsidiary organ of the General Assembly. Subject to that, it is, in the words of Sir Hartley Shawcross, the representative of the United Kingdom, "an organ whose authority and independence in international law were second only to the International Court of Justice."⁷¹ This is so because, under its Statute, it is to be composed of "persons of recognized competence in international law" and because its members are elected to serve in their personal capacity and not to represent their respective governments. Bearing in mind that governments are understandably reluctant to pledge beforehand what their view of international law is going to be on any particular subject-matter, and remembering that the League of Nations Codification Conference at The Hague was unsuccessful principally because the delegates went to it armed with governmental instructions, the student of international law will agree that the relative independence of the Commission should augur well for its ultimate success.

It is true that a majority of the members of the General Assembly, at the session under review, have shown hesitation to adopt forthwith the Draft Declaration on Rights and Duties of States prepared by the Commission. Notwithstanding that, the careful consideration of, and the stimulating debates on, the report of the Commission as outlined above testify anew to the seriousness with which the Members of the United Nations view the task of the progressive development and codification of international law. It is not too much to hope that, given time and perseverance of the International Law Commission and the encouragement and support by the governments, that task will, in due course, be crowned with a success commensurate with its importance.

⁶⁹ *Ibid.*

⁷⁰ General Assembly, 4th Sess., Official Records, Plenary Meetings, p. 549. The full text of the resolution may be found in General Assembly, 4th Sess., Official Records, Resolutions, pp. 66, 67.

⁷¹ General Assembly, 4th Sess., Official Records, Sixth Committee, p. 105.

EDITORIAL COMMENT

CHARTER PROVISIONS ON HUMAN RIGHTS IN AMERICAN LAW

In *Fujii v. California*,¹ decided on April 24, 1950, the District Court of Appeal of the second appellate district of California held that the Alien Land Law of California² must yield to the Charter of the United Nations as the superior authority, and was therefore unenforceable. As this holding was based upon a misconception of the human rights provisions of the Charter, it seems to call for some comment. The writer has been retained by the State of California in a case which has nothing to do with the problems here discussed; this comment is made wholly independently of any views which the State may hold.

THE HUMAN RIGHTS PROVISIONS IN THE CHARTER

The Preamble of the United Nations Charter states that "We the peoples of the United Nations" are determined "to reaffirm faith in fundamental human rights." Article 1 (3) of the Charter states as one of the purposes of the United Nations:

To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; . . .

This statement of a general purpose of the Organization does not impose an obligation on the United States as a Member of the United Nations to take any specific action.

Article 13 (1) provides that the General Assembly shall initiate studies and make recommendations for the purpose of

b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

This article relates entirely to the powers of the Assembly rather than to obligations of Members, and recommendations by the General Assembly do not have a binding character.

¹ California Dist. Ct. App., 2nd Dist., April 24, 1950, reported in Los Angeles Daily Journal, April 25, 1950, p. 1; digest in this JOURNAL, p. 590. An appeal was filed on June 2, 1950.

² 1 Deering's General Laws of California, Act 261 as amended. This law forbids ownership of land by any alien not eligible to citizenship.

Article 55 provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

This statement of the ends to be "promoted" by the United Nations does not create any specific obligation for a Member of the Organization.

In Article 56, the Members "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." The French text, which gives a slightly varied emphasis, provides: "*Les Membres s'engagent, en vue d'atteindre les buts énoncés à l'article 55, à agir, tant conjointement que séparément, en coopération avec l'Organisation.*" The obligation imposed by Article 56 is limited to coöperation with the United Nations. The extent and form of its coöperation are to be determined by the government of each Member.

Article 62 (2) empowers the Economic and Social Council to make recommendations "for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all." This provision, like Article 13 (1), refers only to the competence of a principal organ of the United Nations, whose recommendations are not obligatory.

Article 76 provides:

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

.....

- c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; . . .

Paragraph (c) merely states an objective of the trusteeship system.

THE CHARTER PROVISIONS IN AMERICAN LAW

The Constitution of the United States provides in Article 6 (2) that treaties made under the authority of the United States shall be "the supreme law of the land; and the judges in every State shall be bound thereby."³

³ Corresponding provisions do not exist in the fundamental laws of some Members of the United Nations.

In consequence, a provision in a treaty may be incorporated in the national law of the United States, so as to supersede inconsistent earlier acts of Congress and inconsistent State legislation (*Bacardi Corporation of America v. Domenech* (1940), 311 U. S. 150; *Clark v. Allen* (1947), 331 U. S. 503).

It has long been established, however, that this is true only of self-executing treaty provisions, and that the result does not follow when the treaty provisions merely obligate the United States to take certain action. The classic statement of this principle was made by Chief Justice Marshall many decades ago in *Foster v. Neilson* (1829), 2 Peters 253, 314,⁴ as follows:

Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

Of course a single treaty may contain both kinds of provisions—some which are, and some which are not, self-executing. This view was taken by Chief Justice Stone in *Aguilar v. Standard Oil Co. (New Jersey)* (1943), 318 U. S. 724, 738.

The Charter is a treaty to which the United States is a party; it is "made under the authority of the United States," within the provision of Article 6 (2) of the Constitution. Some of its provisions may have been incorporated into the municipal law of the United States as self-executing provisions; this has been thought to be true, for example, of provisions in Articles 104 and 105 concerning the legal capacity of the Organization and its privileges and immunities (*Curran v. City of New York* (1947), 77 N.Y.S. (2d), 206, 212).

Clearly, however, the Charter's provisions on human rights have not been incorporated into the municipal law of the United States so as to supersede inconsistent State legislation, because they are not self-executing. They state general purposes and create for the United States only obligations to coöperate in promoting certain ends. Insofar as the United States is concerned, they address themselves "to the political, not to the judicial department; and the legislature must execute the contract before it can become a rule for the Court." Apart from action taken by Congress to implement them, the application of the Charter's human rights provisions is not for a court to undertake. The extent to which Congress has power to implement by legislation the human rights provisions of the Charter is another question, which need not be discussed here.

⁴ The specific treaty under consideration in *Foster v. Nielson* was later held to be self-executing.

The "human rights and fundamental freedoms" referred to in Articles 1 (3) and 55 (c), 62 (2), and 76 (c) are not defined in the Charter of the United Nations. In the effort to promote "respect for and observance of" them, no organ of the United Nations has been endowed with legislative power. Mr. Edward R. Stettinius, Jr., who served as the Chief of the United States Delegation at the San Francisco Conference, stressed this point in the hearings on the Charter before the Senate Committee on Foreign Relations in 1945 (Hearings, Part I, p. 45) :

Because the United Nations is an organization of sovereign states, the General Assembly does not have legislative power. It can recommend, but it cannot impose its recommendations upon the member states.

The same point was emphasized by Mr. Leo Pasvolsky, one of the American draftsmen of the Charter, who gave the following explanation of the Chapter of the Charter which contains Articles 55 and 56 (Hearings, Part I, p. 133) :

The objective here is to build up a system of international cooperation in the promotion of all of these important matters. The powers given to the Assembly in the economic and social fields in these respects are in no way the powers of imposition; they are powers of recommendation; powers of coordination through recommendation.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Acting under Article 68 of the Charter, the Economic and Social Council created a commission "for the promotion of human rights." This Commission drafted the Universal Declaration of Human Rights which was adopted by the General Assembly on December 10, 1948 (Official Records, 3d Session, Part I, pp. 71-77).⁵ This Declaration was proclaimed by the General Assembly

as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of member states themselves and among the peoples of territories under their jurisdiction.

On the day before the adoption of the Declaration, the representative of the United States, Mrs. Franklin D. Roosevelt, made the following statement concerning the Declaration (Department of State Bulletin, Vol. 19, No. 494, December 19, 1948, p. 751) :

... my Government has made it clear in the course of the development of the declaration that it does not consider that the economic and social

⁵ This JOURNAL, Supp., Vol. 43 (1949), p. 127.

and cultural rights stated in the declaration imply an obligation on governments to assure the enjoyment of these rights by direct governmental action. . . .

Speaking in the Third Committee of the General Assembly, Mrs. Roosevelt had previously stated that "the draft Declaration was not a treaty or international agreement," and that if it was adopted it would not be "legally binding" (Official Records, 3d Committee, 3d Session, Part I, p. 32).

After these official statements, no doubt can exist as to the character of the Declaration. It is in no sense binding on the Government of the United States, and its provisions have not been incorporated in our national law.

In its opinion the California District Court of Appeal invoked Article 17 of the Universal Declaration, but it did not refer to the limited purpose for which the Declaration was proclaimed by the General Assembly. The provision in Article 17 that "everyone has the right to own property alone as well as in association with others," is so general that it could not sustain the result of the court's decision, even if it were incorporated into American law.

The Human Rights Commission of the United Nations is now engaged in drafting a second instrument—a Covenant on Human Rights. If this Covenant is signed and ratified by the United States, and if it is brought into force by a sufficient number of nations, it will be on a wholly different basis from that of the Declaration. It is designed to be a treaty between various nations. As such, depending on a text which has not yet been finalized, its self-executing provisions might be incorporated into American law; the United States is currently insisting that its provisions should not be self-executing. The California court would seem to have anticipated events which may or may not transpire in the future.

The California court may have relied on the report of a case involving certain provisions of the Alien Land Law of California which was recently before the Supreme Court of the United States. In *Oyama v. California* (1948), 332 U. S. 633,⁶ the Supreme Court found certain provisions of the law to be discriminatory against a citizen of the United States. The question raised in *Fujii v. California* was not there involved; yet in a concurring opinion Justices Black and Douglas went out of their way to declare (pp. 649-650):

There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to co-operate with the United Nations to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?⁷

⁶ This JOURNAL, Vol. 42 (1948), p. 475.

⁷ Cf. *Re Drummond Wren*, 1945 Ontario Reports 778, [1945] 4 D.L.R. 674.

Clearly a court is not the appropriate agency to determine for the Government of the United States the particular way in which it should "cooperate with the United Nations." The fact that the United States has obligated itself to coöperate may be taken into consideration in determining the national public policy, however.

The California law applies to land ownership the same racial discriminations as the Federal law applies to naturalization. If higher courts should affirm the holding that California's Alien Land Law is unenforceable, some doubt might be cast upon the validity of the racial limitations embodied in Section 303 of the United States Nationality Law of 1940, as amended in 1946 (60 Stat. 416, 417).

MANLEY O. HUDSON

SOME THOUGHTS ABOUT RECOGNITION

In a letter of March 8, 1950, to the President of the Security Council, the Secretary General of the United Nations transmitted an originally confidential memorandum prepared by the Secretariat concerning the problem of recognition raised by the claim of the Communist government to represent China in the organs of the United Nations. This memorandum includes the following paragraphs:

The recognition of a new State, or of a new government of an existing State, is a unilateral act which the recognizing government can grant or withhold. It is true that some legal writers have argued forcibly that when a new government, which comes into power through revolutionary means, enjoys a reasonable prospect of permanency, the habitual obedience of the bulk of the population, other States are under a legal duty to recognize it. However, while States may regard it as desirable to follow certain legal principles in according or withholding recognition, the practice of States shows that the act of recognition is still regarded as essentially a political decision, which each State decides in accordance with its own free appreciation of the situation. . . .

Various legal scholars have argued that this rule of individual recognition through the free choice of States should be replaced by collective recognition through an international organization such as the United Nations (e.g., Lauterpacht, *Recognition in International Law*). If this were now the rule then the present impasse would not exist, since there would be no individual recognition of the new Chinese government, but only action by the appropriate United Nations organ. The fact remains, however, that the States have refused to accept any such rule and the United Nations does not possess any authority to recognize either a new State or a new government of an existing State. (To establish the rule of collective recognition by the United Nations, would require either an amendment of the Charter or a treaty to which all Members would adhere.)

On the other hand, *membership* of a State in the United Nations and *representation* of a State in the organs is clearly determined by a collective act of the appropriate organ; in the case of membership,

by vote of the General Assembly on recommendation of the Security Council, in the case of representation, by vote of each competent organ on the credentials of the purported representatives. Since, therefore, recognition of either State or government is an individual act, and either admission to membership or acceptance of representation in the Organization are collective acts, it would appear to be legally inadmissible to condition the later acts by a requirement that they be preceded by individual recognition. . . .

The practice as regards representation of Member States in the United Nations organs has, until the Chinese question arose, been uniformly to the effect that representation is distinctly separate from the issue of recognition of a government. It is a remarkable fact that, despite the fairly large number of revolutionary changes of government and the large number of instances of breach of diplomatic relations among Members, *there has not been one single instance of a challenge of credentials of a representative* in the many thousands of meetings which were held during four years. On the contrary, whenever the reports of credentials committees were voted on (as in the sessions of the General Assembly), they were always adopted unanimously and without reservation by any Members.

The Members have therefore made clear by an unbroken practice that (1) a Member could properly vote to accept a representative of a government which it did not recognize, or with which it had no diplomatic relations, and (2) that such a vote did not imply recognition or readiness to assume diplomatic relations. . . .

It is submitted that the proper principle can be derived by analogy from Article 4 of the Charter. This article requires that an applicant for membership must be able and willing to carry out the obligations of membership. The obligations of membership can be carried out only by governments which in fact possess the power to do so. (Where a revolutionary government presents itself as representing a State, in rivalry to an existing government, the question at issue should be which of these two governments in fact is in a position to employ the resources and direct the people of the State in fulfillment of the obligations of membership.) In essence, this means an inquiry as to whether the new government exercises effective authority in the territory of the State and is habitually obeyed by the bulk of the population.

If so, it would seem to be appropriate for the United Nations organs, through their collective action, to accord it the right to represent the State in the Organization, even though individual Members of the Organization refuse, and may continue to refuse, to accord it recognition as a lawful government for reasons which are valid under their national policies.

This memorandum is not concerned with the distinction between the recognition of states and the recognition of governments, but with the distinction between (1) the recognition of a state or a government and (2) the admittance of a state to membership or to representation in the United Nations. It is also concerned with the distinction between the policies of a Member of the United Nations in respect (1) to the recog-

dition of a state or government and (2) to the approval of the admittance of a state to the United Nations or of the credentials of a representative of a Member State. The latter distinction seems more verbal than real and so does the former, if attention is confined to the effect of these acts under general international law.

Recognition of a new state means only that the recognizing authority proposes to treat the entity as a state under international law and recognition of a government means only that the recognizing authority proposes to treat the government as representative of a state. In this sense, the United Nations, by admitting an entity to its membership, can be properly said to "recognize" that entity as a state, and if it admits an individual appointed by a government as a representative of a state, it can properly be said to "recognize" the appointing government as the government of that state. Admittance to the United Nations implies, of course, much more than recognition of statehood, because it adds to the rights and duties of a state under general international law, the rights and duties of a Member under the Charter, but Articles 2 (1) and 4 make it clear that every Member is regarded by the United Nations as a sovereign state with a position under general international law equal to that of other sovereign states.¹ The question is not whether the United Nations can recognize, but whether its recognition is binding on anyone else.

On this question, the important distinction seems to be that between "particular recognition" and "general recognition." The latter term means something different from "collective recognition." An international tribunal may be faced by the question of whether a given entity is a state or is a government capable of representing a state. In answering this question an international tribunal must utilize the conception which this writer calls "general recognition." That is, it must reach a conclusion whether the community of nations as a whole regards the entity as a state or as a government. Doubtless factors other than "recognitions" by states and international organizations, such as *de facto* existence, the probable duration of such existence, the stability of the

¹ It follows from this that in the contemplation of the United Nations the Ukraine and Byelorussia are sovereign states, and the Union of Soviet Socialist Republics does not include those two republics. British Commonwealth and League of Nations practice interpreted the term "British Empire" used in the Covenant to mean "Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League." Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 (Cmd. 2768, 1926 (append.)); P. J. Noel Baker, *The Present Juridical Status of the British Dominions in International Law* (London, 1929), pp. 360 ff., 395, 401; Q. Wright, *Mandates Under the League of Nations* (Chicago, 1930), pp. 130-31. Goodrich and Hambro, *Charter of the United Nations* (2nd ed., Boston, 1949), pp. 98 ff., 124 ff., 132) point out the discordance between the legal and the factual situation in regard to certain Members of the United Nations.

entity, etc., will enter into the judgment of the tribunal as evidence of the probable intention of members of the community of nations which have not expressly recognized the entity, or of the probable motives of those that have explicitly refused to recognize it. But evidence of "general recognition" by the members of the community of nations, whether express, tacit or presumed, is of major importance for determining the position of the community of nations on the subject. In the case of a new government, *de facto* control of the organs and the territory of the state creates a presumption not to be overridden even by widespread failure to accord express recognition. In the Tinoco Arbitration between Great Britain and Costa Rica, Chief Justice Taft, as arbitrator, said:

I must hold from the evidence that the Tinoco government was an actual sovereign government. But it is urged that many leading powers refused to recognize the Tinoco government, and that recognition by other nations is the chief and best evidence of the birth, existence and continuity of succession of a government. Undoubtedly recognition by other powers is an important evidential factor in establishing proof of the existence of a government in the society of nations. [He then points out that twenty governments had recognized the Tinoco government and, after discussing the position of others which had not, including the United States, Great Britain, France, and Italy, continues:] The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a *de facto* government under Tinoco for thirty months is probably in a measure true of the non-recognition by her allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standard set by international law.²

There can, of course, be no absolute criterion of how many recognitions, express or implied, it takes to constitute "general recognition." The importance of the recognizing states would undoubtedly deserve consideration. It is submitted, however, that, in view of the size of its membership and of its position with reference to the community of nations as a whole,³ recognition of an entity as a state or a government by the United Nations would usually provide adequate evidence of "general

² This JOURNAL, Vol. 18 (1924), pp. 152-154.

³ See especially Art. 2, par. 6, of the Charter.

recognition." By that is meant that a tribunal applying international law would normally have to hold that the entity in question was a state or a government in the sense of general international law.⁴

This, of course, does not mean that a particular state might not remain obdurate, and of course its own courts would have to follow the views of the political organs of the state. It would, however, be difficult for a state to long maintain such an attitude, particularly if it were a member of the United Nations and consequently had to deal with the entity recognized by the United Nations as a state or a government within the organs of the United Nations. It might refuse to deal with the entity at all outside the United Nations, but it would find it confusing to deal with another government of the same state diplomatically.

Therefore by the nature of the situation "recognition" by the United Nations does ordinarily constitute "general recognition" and has an objective effect different from that of recognition by any single state.⁵ This results from the situation, and no amendment of the Charter or treaty conferring new powers on the United Nations is necessary to bring about this consequence.

The other question raised concerns the policy of states in extending recognition to other states and governments. The Secretariat memorandum asserts that "the Members have . . . made clear by an unbroken practice that (1) a Member could properly vote to accept a representative of a government *which it did not recognize*, or with which it had no diplomatic relations, and (2) that such a vote did not imply *recognition or readiness to assume diplomatic relations*" (Italics supplied). If both phrases had been confined to "diplomatic relations" and the underlined phrases concerning "recognition" had been omitted, the sentence would have been unexceptionable.⁶ States may well vote to admit Yemen to the United Nations, even though they do not maintain diplomatic relations with it and have no intention of doing so, but it is submitted, that they have no right to vote for Yemen as a Member unless they consider it a state, i.e., "recognize" it, since under Article 4 of the Charter state-

⁴ The International Court of Justice as "the principle judicial organ of the United Nations" (Art. 92) would appear to be bound by such "recognitions" by the principal political organs of the United Nations, i.e., the General Assembly and the Security Council. If they differed, the opinion of the General Assembly, as the more widely representative, would probably be held to prevail.

⁵ This was generally accepted in respect to the League of Nations. Malbone W. Graham, *The League of Nations and the Recognition of States* (1933), pp. 34, 39; In *Quest of a Law of Recognition* (1933), p. 21; Lauterpacht, *Recognition in International Law* (Cambridge, 1947), pp. 401 ff.

⁶ "The distinction must be asserted between recognizing a government and entering into diplomatic relations with it. No state is legally obliged to enter into and maintain diplomatic relations with a State or Government which it recognizes. On the other hand, it can not enter into full and normal diplomatic relations with a State or Government which it does not recognize" (H. Lauterpacht, *London Times*, Jan. 6, 1950).

hood is a prerequisite for membership in the United Nations. Furthermore, a Member has no right to vote to accept credentials emerging from "the government" of Yemen unless it thinks that government is really the government of Yemen, i.e., unless it "recognizes" it. It could hardly think that, if it is at the moment dealing diplomatically with another government of Yemen. It is doubtful whether the instances on which the statement was based referred to cases where a Member of the United Nations definitely took the position that the entity seeking admission was not a state or that the representative was appointed by a group which the Member in question thought was not the government of a state. In the Chinese situation it is difficult to see how an American representative in any organ of the United Nations can vote to approve the credentials of the Communist government so long as the President of the United States continues to regard the Kuomintang government as the Government of China.

If the United States applied its traditional policy of recognizing *de facto* governments, it would probably find itself recognizing the Communist government. Professor Lauterpacht in the *London Times* for January 6, 1950, implied that the action of the British Government in recognizing the Communist government of China could be supported on that ground. This position can be accepted as an implication of traditional national policy without endorsing Professor Lauterpacht's position that there is a legal obligation for states to recognize a *de facto* government.⁷ The doctrine asserted by Mexican Foreign Minister Estrada in 1930 went even further in demanding that *de facto* governments of recognized states be tacitly accepted without recognition. This doctrine contemplated, according to Philip Jessup, "the obliteration of the distinction between change of government by peaceful balloting and change of government by revolution or *coup d'état*."⁸ Though recognizing its consistency with the principle of the continuity of the state and the domestic character of governmental changes, Jessup notes that the Estrada Doctrine "will not always save foreign governments from the necessity of choosing between rival claimants," an observation supported by the present situation respecting China. Perhaps it is impracticable to go beyond the statement of Justice Taft in the Tinoco Arbitration⁹ and the implication in the Secretariat Memorandum that recognition of new governments ought to be based only on considerations of actual control.) The statement in the Memorandum that political considerations have frequently entered into such recognition, however, conforms with practice.¹⁰

⁷ *Ibid.* and Lauterpacht, *Recognition in International Law*, pp. 6, 25.

⁸ This JOURNAL, Vol. 25 (1931), p. 722.

⁹ Above, note 2.

¹⁰ Professor Lauterpacht does not deny this but suggests that "the lawyer abandons his legitimate province once he begins to probe into the motives which have induced governments to express their obligation to act upon a legal rule. Such realism may be

The fact that different states and international organizations recognize the same entity independently creates possibilities of conflict. If, for example, the Security Council or the General Assembly should by the usual procedure for accepting credentials accept credentials from the Communist government of Chinese, even though the United States voted against it, it seems clear that for purposes of United Nations activities the United States would have to accept that decision, even though it continued to deal diplomatically with the Kuomintang government.¹¹ Furthermore, the fact that different organs of the United Nations might accept the credentials of different governments of the same state presents embarrassing possibilities, but it is in essence no different from the situation of a state which may have to deal with one government diplomatically and with another in the organs of the United Nations. Such situations actually arose during the history of the League of Nations.¹²

It has been reported that the Kuomintang government of China would be willing to accept the judgment of the General Assembly, but not that of the Security or other Councils, in respect to admitting the Communist representatives. Such a practice may prove desirable. All organs of the United Nations might well continue to accept credentials from the pre-existing government until the General Assembly has "recognized" a new government by acceptance of its credentials.

In making such a decision the General Assembly might well follow the criterion stated in the next to the last quoted paragraph of the Secretariat Memorandum formulating the *de facto* theory of recognition. Perhaps this theory should not entirely ignore the question of whether the government which at the moment is "in a position to employ the resources and direct the people of the state in fulfillment of the obligations of membership" is

appropriate for the historian and the sociologist. The jurist is concerned with the legal rule upon which governments profess to act" unless, he adds in a footnote, "a government uses grandiloquent language the insincerity or cynicism of which are so patent as to preclude it from being accepted at its face value" (*Ibid.*, p. 25).

¹¹ The Soviet Government has drawn a different conclusion in absenting itself since its recognition of the Communist government of China from all organs of the United Nations which continue to recognize the Kuomintang government. This interpretation seems to be irreconcilable with the obligations assumed by the Soviet Union under Arts. 2 (2), 9, 23 and others of the Charter. Other Members of the United Nations which have recognized the Communist government of China continue to deal with the Kuomintang government in United Nations organs.

¹² During the Spanish Civil War certain Members of the League of Nations dealt with Franco in respect to certain parts of Spain, while they dealt with the Loyalist government of Spain in the League of Nations. After the Italian conquest of Ethiopia certain Members of the League continued to deal with Haile Selassie's Government in the League while they dealt with Italy on interests in Ethiopian territory. In many cases Members of the League broke or refused to establish relations with the governments of other Members of the League outside of League organs (Lauterpacht, *op. cit.*, p. 402).

sufficiently stable to justify confidence that it will continue to do so for some time in the future, and in that connection the attitude of the population toward it would not be irrelevant.¹³

The Secretary General's memorandum indicates the complexities of the problem of recognition and the importance of an acceptable formulation of its principles. The observations here made have been based upon the following assumptions:

1. Recognition is the expression of judgment by a state, an international organization, or other subject of international law that a condition of facts has legal consequences, *i.e.*, constitutes a status or title.¹⁴

2. A great variety of facts have legal consequences and therefore may be the subject-matter of recognition. These include facts alleged to establish the status of states, protectorates, trusteeships, international organizations, and other subjects of international law; of governments, diplomats, consuls, commissioners and other representatives of subjects of international law; of belligerency, insurgency, neutrality, aggression and other abnormal situations; of treaties, national declarations of policy or law, resolutions of international conferences or organizations, awards of international tribunals and other transactions; of titles to territory, jurisdiction and other rights under international law.¹⁵

3. International law defines with varying degrees of precision the criteria and evidence which ought to establish these different statuses. Thus the conditions which should give status to a new government of an existing state are more clearly defined than those which should give status to a new state. In the first of these cases it has even been said that the criteria and evidence are so clear that recognition is unnecessary, although consideration of the actual situations gives ground for doubt.¹⁶ In the case of new states

¹³ Lauterpacht, *op. cit.*, pp. 98 ff., 339.

¹⁴ Writers have usually been so intent in distinguishing the recognition of different things—states, governments, belligerency, etc.—that they have neglected to define the concept itself. But see H. Lauterpacht (Institute of Pacific Relations Inquiry Series, *Legal Problems in the Far Eastern Conflict*, 1941, p. 130), who defines recognition as "the treatment of a new title as valid"; and Georg Schwarzenberger (*International Law*, (London, 1945), Vol. 1, p. 53), who treats recognition as an act of a subject of international law which "can be adduced against it by other subjects of international law as a proof of acquiescence." To similar effect, a report presented to the Virginia Beach Conference of the Institute of Pacific Relations, 1939, declared "Recognition has the legal effect of waiving whatever legal opposition the recognizing state might be able to make to the assertion by another state of a new legal title." *Legal Problems in the Far Eastern Conflict*, p. 181.

¹⁵ While instances can be found of applying the term "recognition" to all these situations, it has most commonly been applied to new states, new governments, belligerency, and territorial transfers.

¹⁶ Above, note 8. The conditions which give title to territory are so clearly defined that recognition is usually, but not always, unnecessary (Lauterpacht, *Recognition in International Law*, p. 411). The conditions which constitute hostilities, belligerency,

international law in principle imposes limitations upon the discretion of other states in according or withholding recognition. Recognition of a new state may be premature, it may be unduly delayed, and it may, according to the Stimson Doctrine, be forbidden to states acting individually.¹⁷ On the other hand, conditions which give status to unilateral declarations of policy, such as the Monroe Doctrine (1823) and the continental shelf doctrine (1945) or to unilateral declarations of international law such as the British navigation rules (1863) are hardly defined at all. Consequently, states exercise almost complete discretion in according or withholding recognition of such acts.¹⁸

4. It follows that while in principle recognition is a juridical act applying legal criteria to factual evidence, in practice the insufficiency of legal criteria

aggression, insurgency, piracy, or police action are so unclear that recognition is always necessary. In fact the distinctions are so important and attitudes are so likely to differ that collective procedures, as contemplated under the United Nations Charter are especially desirable (Q. Wright, "The Present Status of Neutrality," this JOURNAL Vol. 34 (1940), pp. 403 ff.

¹⁷ While premature recognition constitutes in principle a violation of the rights of the parent state, it is less certain that delayed recognition violates the rights of the new state or that recognition of the fruits of aggression violates rights of the victim or of the community of nations (see I.P.R. Report, above, note 14, and comments by Q. Wright, H. Lauterpacht and E. M. Borchard, *ibid.*, pp. 3 ff., 58, 115 ff., 129 ff., 157 ff.). Efforts have been made to define precisely the conditions of statehood (W. H. Ritscher, *Criteria of Capacity for Independence*, Jerusalem, 1934). The Permanent Mandates Commission formulated criteria, realization of which would justify or even require the emancipation of a mandated community, and these were accepted by the League of Nations Council and applied in the case of Iraq (Permanent Mandates Commission, Minutes, Vol. 20, p. 229; Q. Wright, "Proposed Termination of the Iraq Mandate," this JOURNAL, Vol. 25 (1931), pp. 436 ff.). Criteria formulated by the League of Nations and the United Nations in admitting new Members and by national governments in recognizing states and emancipating colonies are believed by some to be sufficiently precise to justify the assertion of a duty to recognize new states. "The emphasis—and that emphasis is a constant feature of diplomatic correspondence—on the principle that the existence of a State is a question of fact signifies that, whenever the necessary factual requirements exist, the granting of recognition is a matter of legal duty." (Lauterpacht, *Recognition in International Law*, p. 24). "When a country has by any process attained the likeness of a State and proceeds to exercise the functions of one, it is justified in demanding recognition. There may be no reason or disposition on the part of States generally to withhold recognition provided the fact be established that the requisite elements of statehood are present and give promise of remaining. The method by which the new State comes into being may, however, cause delay in the according of recognition. Thus when an outside State proceeds to set up a new State within territory which prior to such action constituted part of the domain of an existing State, and in opposition to its will, the procedure may cause other States to be reluctant to acknowledge the validity of the achievement, and to withhold recognition of the new State whose birth takes place under such conditions" (C. C. Hyde, *International Law* (3rd ed., Boston, 1945), Vol. 1, pp. 148-149).

¹⁸ For discussion of the recognition of these doctrines see *Legal Problems in the Far Eastern Conflict*, p. 77; C. G. Fenwick, *International Law* (3rd ed., 1948), p. 380; *The Scotia* (1871), 14 Wall. 170.

often gives it the character of a political or legislative act. In practice, even when the criteria of status are rather clearly defined, as in the case of new governments and states, recognition has often been granted or withheld on the basis of political considerations.¹⁹

5. This tendency arises because of the creative influence of recognition. A legal claim, however good, may not be effective until so judged by a competent court, and the judgment of a court of last resort acting within its jurisdiction is valid even though contrary to law and facts. Courts in principle declare and apply law, but in practice they sometimes make it. In the same way the claim to be a state or government or to enjoy some other status may be ineffective until generally recognized, but if generally recognized, it is valid even if contrary to law and facts. States can, therefore, promote their policies by recognizing facts not yet established or by refusing to recognize facts which are at the moment established. Recognition is in principle declaratory but in practice it is constitutive.²⁰

6. Recognition or refusal to recognize by a single state controls the conduct of its own courts and other organs, estops the state from denying a status or title which it has recognized, and contributes to general recognition or non-recognition, but in itself it cannot create or deny status under international law. It does not, therefore, change the legal position of other states, though it may exert political influence upon them.²¹

7. General recognition establishes status objectively. All states, international tribunals, and international organizations are bound to give appropriate effect, when the occasion arises, to a status thus established. General recognition seems to be the only method known to customary international law whereby the legal consequences of facts, the validity of claims, the status of entities and changes of law can be authoritatively established.²²

8. General recognition occurs when the important states which are in an important degree affected by the status in question, have expressly recognized the status, or, in case conditions exist clearly defined by international law as requisite for the status, can be presumed to have acquiesced by refraining from an explicit declaration of non-recognition. An international tribunal, in deciding whether a status exists, has to decide what states were

¹⁹ In the jurisprudence of the Supreme Court of the United States recognition has usually been considered a "political question." Moore, *Digest of International Law*, Vol. I, pp. 744 ff.; Q. Wright, in *Legal Problems in the Far Eastern Conflict*, pp. 118 ff.; O. C. Hyde, *International Law*, Vol. I, p. 156.

²⁰ Lauterpacht, who in general supports the juridical character of recognition, acknowledges that general recognition may be "quasi-legislative." *Legal Problems in the Far Eastern Conflict*, p. 145; see also Report to Virginia Beach Conference, *ibid.*, pp. 182 ff.

²¹ Above, note 14.

²² See Q. Wright, "The Present Status of Neutrality," this JOURNAL, Vol. 34 (1940), pp. 403 ff.

so unimportant or so little interested that their recognition or non-recognition can be ignored, and what statuses are so clearly defined by international law that their existence in fact creates a presumption of acquiescence or tacit recognition.²³

9. General recognition may be effected by the accumulation of individual recognitions and the manifestation of acquiescences through the passage of time, or by collective action of a sufficient number of states in an international conference or organization.²⁴ Collective recognition may be effected directly by a conference resolution or a treaty binding the participants, or indirectly by treaty provisions establishing procedures or agencies competent to make decisions binding the parties. The admission of new Members to the United Nations, the acceptance of the credentials of new governments, and the passage of resolutions by the General Assembly of the United Nations are procedures by which the status of states, governments and principles may be established in respect to the United Nations and in some degree in respect to its Members. These procedures provide evidence of general recognition but the actual vote on particular measures is relevant in judging the conclusiveness of this evidence.

10. A state recognizes by any act manifesting the intention of the constitutionally authorized organ (usually the chief executive or representative authority) to recognize. Formal acts are to be considered as evidence of this intention and do not constitute recognition if performed by subordinate agencies contrary to the intention of the recognizing authority and repudiated in reasonable time. Recognition extends no further than intended. Thus intention to recognize a state may not manifest an intention to exchange diplomatic officers. Recognition of an international organization may not manifest an intention to recognize the statehood of all its members.²⁵

11. An international organization recognizes by the procedures of admission, acceptance of credentials, and resolution provided in its constitution. Such recognitions extend only to those matters within the competence of the recognizing organ and bind the members of the organization only to that extent. Thus, while admittance of a state to the United Nations and acceptance of credentials from its government by an organ of the United Nations obliges Members to deal with that state and its government in the United Nations, it does not, in principle, oblige them to deal with the state or government elsewhere or to exchange diplomatic officers.²⁶

12. As the relations of states, originally in large measure bilateral, become in greater degree multilateral, the decentralized and cumulative procedure for establishing "general recognition" of status has increasingly

²³ See also par. 8 above.

²⁴ Above, note 5.

²⁵ "A new state of affairs is not opposable to a State which has not recognized it, and, if it has done so, only within the limits of such recognition." Schwarzenberger, *op. cit.*, p. 53; Hyde, *op. cit.*, Vol. 1, pp. 149 ff.

²⁶ It may, however, constitute general recognition. See note 6 and par. 9 above.

led to uncertainty and confusion. There has been a tendency for states to accept collective procedures through the League of Nations and the United Nations for according general recognition. Further development of this tendency would add considerably to precision in applying international law.²⁷

QUINCY WRIGHT

INTERNATIONAL LAW AND NATIONAL LEGISLATION IN THE TRIAL OF WAR CRIMINALS
—THE YAMASHITA CASE

Since the decision of the United States Supreme Court in the case of General Yamashita, denying application for leave to file a petition for a writ of *habeas corpus*,¹ and the subsequent execution of the sentence of the Military Commission, there has been some effort to create opinion against the legality of the proceedings. Recently one of the counsel assigned for the defense has published a book entitled *The Case of General Yamashita*.² The argument is based largely, although not entirely, upon the dissenting opinions of Justices Murphy and Rutledge. It is not intended here to discuss the fairness of the trial nor to recapitulate the grounds upon which the Supreme Court held that the Military Commission was lawfully created and that the failure to give advance notice of the trial to the neutral Power (Switzerland) under Article 60 of the Geneva Convention did not divest the authority and jurisdiction of the Commission. However, the arguments now made against the legality of the proceedings are largely based on national legislation and this requires some comment from the point of view of international law.

It has not been sufficiently recognized that Congress, by sanctioning the trial by military commissions of enemy combatants for violations of the laws of war, has not attempted to codify the law of war. In *Ex parte Quirin*,³ the Supreme Court held that Congress in the exercise of its powers to define and punish offenses against the law of nations had recognized the military commission as an appropriate tribunal for the trial and punishment of offenses against the law of war. The Articles of War⁴ enacted under this authority declare (Article 15) that the Articles shall not be construed as depriving military commissions of concurrent jurisdiction in respect of offenders or offenses that, by statute or by the law of war, may be triable by such military commissions. Thus

²⁷ Lauterpacht, *Recognition in International Law*, p. 402; Graham, *The League of Nations and the Recognition of States*, p. 34.

¹ In the Matter of the Application of General Tomouki Yamashita, 66 Supreme Ct. Rep. 340 (1946). This JOURNAL, Vol. 40 (1946), p. 432.

² A. Frank Reel, *The Case of General Yamashita* (University of Chicago Press, 1949). A Memorandum in reply was issued by Brigadier General Courtney Whitney in mimeograph form from General Headquarters, Tokyo, November 22, 1949.

³ *Ex parte Quirin* (1942), 317 U. S. 1; this JOURNAL, Vol. 42 (1948), p. 152.

⁴ 10 U. S. C. §§ 1471-1593.

Congress did not attempt a codification but had incorporated as within the pre-existing jurisdiction of military commissions all offenses which are defined as such by the law of war. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis Powers were parties.

From the point of view of international law relating to the trial of combatants for violations of the law of war, it is important to distinguish between jurisdiction and procedure applicable to the trial of two classes of persons subject to military law, viz.: (1) members of the Army, and personnel accompanying the Army, and (2) enemy combatants. As the Supreme Court pointed out, Congress gave sanction in its recognition of military commissions to traditional jurisdiction over enemy combatants unimpaired by provisions of national legislation contained in the Articles of War, so far as such offenses and jurisdiction are contemplated within the common law of war. In other words, Congress sanctioned the use of the military commission for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not apply. Article 2 defines the persons subject to and entitled to claim the benefits of the Articles of War as being the members of the Army and personnel accompanying the Army, while Article 15 declares that military commissions have concurrent jurisdiction over both army personnel and enemy combatants.

It is undoubtedly true that by international agreement granting the benefits of national legislation, such as the Articles of War of the United States, a military tribunal may be bound to accord the same benefits to an enemy combatant as are afforded to members of our own forces. General Yamashita urged that by virtue of Article 63 of the Geneva Convention of 1929, he was entitled to the benefits afforded by the 25th and 38th Articles of War. Article 63 of the Geneva Convention provides that "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." This is an instance where national legislation has been incorporated as part of an international agreement so that it becomes unimportant to consider whether the provision has become part of customary international law. This interpretation results from an analysis of Articles 45-67, which deal with "Penalties Applicable to Prisoners of War." These Articles define the nature of these offenses and the penalties to be imposed. The context of the articles of the Convention incorporated into the Articles of War gives a comprehensive description of the substantive offenses which prisoners of war commit during their imprisonment, the penalties which may be imposed and the procedure by which guilt may be ad-

judged and sentence pronounced. The accused was a prisoner of war at the time of his trial, but he was not charged with any crime committed after hostilities had ceased but only with offenses during the conduct of the war before his arrest.

General Yamashita, as Commanding General in the Philippine Islands, was charged with permitting the perpetration of a long list of massacres and mistreatment of men, women and children, unarmed noncombatant civilians, without cause or trial. The facts and circumstances were set out in the specifications with great particularity of time and place. His main defense was that he had neither ordered any of these acts nor had knowledge of them. However, the widespread and continuing nature of these acts, together with the warning of General MacArthur given at the time of his landing on Leyte that the Japanese military authorities in the Philippines would be held immediately liable for any harm which might result from failure to observe proper treatment of the civilian internees or noncombatants, justified the conclusion of his personal responsibility for failure to take proper precautions to prevent the excesses of his troops. The fact that a Supreme Commander could be held responsible for such excesses even though not committed in his presence had already been envisaged at the close of World War I in the report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.⁵ The Commission listed as part of the charges to be brought for violations of the laws and customs of war, among others, the following:

(c) Against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or with knowledge thereof and with the power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war (it being understood that no such abstention should constitute a defense for the actual perpetrators). . . .⁶

The reservations made by the United States representatives did not affect this part of the report except so far as to object to the inclusion of heads of state. The reservations emphasized, however, that the accused "should have knowledge of the commission of the acts of a criminal nature and that he should have possessed the power as well as the authority to prevent, to put an end to, or repress them." It is curious to observe that the two Japanese members of the Commission were willing to go further than the American members, because they signed the report without *any* reservations.

⁵ This JOURNAL, Vol. 14 (1920), p. 95.

⁶ Historical Survey of the Question of International Criminal Jurisdiction, United Nations (1949), U.N. Doc. A/C.N.4/7/(Rev.1); this JOURNAL, Vol. 14 (1920), p. 121.

The Governments of the United States, France, the United Kingdom and the Soviet Union concluded an agreement on August 8, 1945, in London, providing for the establishment of an International Military Tribunal for the trial of war criminals,⁷ to which nineteen other governments of the United Nations subsequently adhered. The agreement contained a charter annexed to and forming an integral part of the agreement containing various provisions for the fair trial of defendants and for the expeditious conduct of proceedings. The terms of this agreement followed in many respects the recommendations of the Commission of 1919 and were substantially adopted by General MacArthur as Supreme Commander for the Allied Powers under whose mandate the trial of Yamashita was held. General MacArthur subsequently reviewed the proceedings and approved the sentence.

The regulations governing the procedure for the trial directed that the Commission should admit such evidence "as in its opinion would be of assistance in proving or disproving the charge or such as in the Commission's opinion would have probative value in the mind of a reasonable man." It has long been recognized that military commissions are not bound by the ordinary rules of evidence, but, in the absence of statute, may prescribe their own rules so long as they "act in accordance with the principles of justice, honor, humanity, and the laws and usages of war."⁸ It was doubtless intended by Congress to adopt a different procedure in trials of Army personnel but not of enemy combatants for offenses against the customary laws of war. The "due process" clause of the Fifth Amendment had already been held by the Supreme Court not to be applicable to military trials of enemy combatants.⁹

The limitations of an editorial comment prevent an extended appraisal of a trial lasting nearly six weeks with a record of over four thousand pages and over four hundred exhibits. General Yamashita was tried chiefly for crimes against noncombatants committed on a scale so vast that the accomplishment to be hoped for as a result of the trial ought to be far removed from any mere satisfaction of vengeance or even of retributive justice but as a deterrent against similar conduct in the future.

ARTHUR K. KUHN

FREEDOM OF COMMUNICATION ACROSS NATIONAL BOUNDARIES

International lawyers would be gravely delinquent in their duties if they were not giving the most serious thought to the ways and means by which the existing rules of law may be developed and extended to meet the present crisis. Within less than five years of the establishment of the United Nations the system of collective security has broken down and a new bal-

⁷ This JOURNAL, Supp., Vol. 39 (1945), p. 257.

⁸ Charles Fairman, *Law of Martial Rule* (2nd ed., 1943), pp. 264-265.

⁹ *Ex parte Quirin*, *loc. cit.*, at p. 41.

ance of power is being contrived which it is hoped will give the protection against aggression which the organized community of nations appears to be unable to give. To say that the problem is a "political" one, outside the range of international law, is to evade the issue. For it is precisely the task of the international lawyer to reduce political problems to legal ones, and to point out the deficiencies in the law which explain the existence of a crisis such as the one through which the United Nations is now passing.

Is there an obligation on the part of every state to coöperate with the other members of the international community in an effective system of collective security? What are the conditions of such an effective system? If it should require a corresponding restraint upon the traditional sovereignty of the state, may that restraint be demanded as an essential condition of membership in the international community? Is there an obligation on the part of every state to permit freedom of communication across national boundaries to the extent necessary to assure mutual confidence between states and reliance upon the observance of the rule of good faith? Perhaps the last question is the key to the others, inasmuch as no plan for the limitation of armaments under the conditions of the present day could be successful unless accompanied by the opening of the channels of information and the maintenance of direct contacts between the people of one state and those of another.

It would be difficult to maintain that there is a specific rule of positive law obligating a state to open up its boundaries to communication with other states. The Charter of the United Nations implies relations of mutual intercourse between states and respect by each state for certain fundamental rights of man as man. But the Charter states the obligation in abstract form and leaves to each state the application of the obligation under the conditions of its own national life. The efforts now being made to formulate the terms of a convention providing for freedom of communication indicate a general belief that the abstract provisions of the Charter need to be reduced to more concrete obligations if the principle of freedom of communication is to be anything more than a promise, to be carried out at the convenience of the individual state.

But the provisions of the Charter of the United Nations do not exhaust the sources of obligation. International law is a dynamic, not a static system. It consists not merely of specific rules formulated in treaties or taking shape as a result of established usage and custom, but of general principles that are part of the heritage of Christian civilization, principles which Grotius and his predecessors regarded as part of the natural law and which we today describe as the fundamental rights and duties of states. The rule of good faith is one of these principles. So also is the rule of mutual trust in the pledged word, resulting in mutual confidence that the intentions of the state are reflected in its public declarations, both of which are corollaries of the rule of good faith. Deductions from these funda-

mental principles are valid rules of law, although it is obvious that any such deductions must not be the arbitrary decisions of an individual state but must have behind them the public opinion of the organized community of nations.

These fundamental principles of international law grow and expand in their application with the changing conditions of the international community. The invention of new instruments of destruction automatically extends the scope of the obligations entailed by the rule of good faith and its corollary, the rule of mutual confidence. Under the conditions of the present day a surprise attack can be so devastating as to give a tremendous initial advantage to the state making the attack. In turn, the possibility of such a surprise attack may create a situation of tension between nation and nation so serious as to give rise to a new obligation of maintaining open channels of communication as the necessary means of relieving the tension. Thus freedom of communication, which a century ago may have called for nothing more than trade between the ports of one country and those of another, has now come to mean direct contact between the peoples of the two countries as a means of creating mutual assurance that no sudden and unexpected attack is being planned. What could not have been demanded a century ago, when there was no urgent necessity for it, can be demanded today as an essential condition of membership in the international community and of the fulfillment of the fundamental principle of good faith.

The Charter of the United Nations, while making collective security the cornerstone of the new organization, recognizes nevertheless that the system of collective security for which it provides may not at all times function effectively, and that under such circumstances the individual members of the organization retain the right of individual self-defense or of collective defense by smaller groups. What is the scope of the measures that may be taken in such cases? Are they limited to measures by which an act of aggression may be resisted when once it has been committed, and when perhaps resistance can only be made at prohibitive cost? Or do they extend to measures by which acts of aggression may be anticipated and perhaps prevented by reason of such anticipation? It would seem that freedom of communication might properly come within such measures of preventive anticipation, and that it is therefore a right of every nation to demand it under the circumstances contemplated and an obligation of every nation to grant it. Possibly it is not too much to say that freedom of communication is the one effective measure available today of preventing the conflict to which the present competition in armaments seems to be inevitably leading. It is the tragedy of the times that it is being rejected by the government whose people would have most to gain by it.

Towards the close of the first World War President Wilson, having in mind a war which had been brought on by the arbitrary decision of irre-

sponsible monarchs, proclaimed that the world must be "made safe for democracy." The proclamation evoked in many quarters of his own country only irony and cynicism. Today, perhaps, we can see better its meaning, and can understand it in terms of national defense as well as of political idealism. The world must be made safe for democracy; for democracy with all its domestic advantages has one very serious disadvantage as against the dictatorships: it can be taken off its guard. Democracy is reluctant to submit to military discipline in time of peace; it refuses to be herded into training camps; it objects to restraints upon freedom of speech and of the press when the urgency is not apparent; it has its own ideas of the need of measures of preparedness, and it resents the burdens it must bear in the interest of defense against a possible aggressor against whom it has itself no designs of aggression. Possibly the time is now at hand when democracy will demand freedom of communication as a first step towards self-protection against dictatorships, and will demand it with a determination that will not admit of refusal, knowing that its own survival as a democracy is at issue.

C. G. FENWICK

CURRENT NOTES

NEW OFFICES OF THE SOCIETY

On June 2, 1950, the American Society of International Law transferred its headquarters from 700 Jackson Place, N.W., where it had maintained its offices since 1911, to 1422 F Street, N.W., Washington, D. C. This change was made necessary by the closing of the Washington office of the Carnegie Endowment for International Peace.

The quarters and office facilities in the Carnegie Endowment which the Society has enjoyed for almost forty years were generously made available to the Society in 1911 by the trustees of the Endowment at the suggestion of the Honorable Elihu Root, then President of the Endowment and the first President of the American Society of International Law. Dr. James Brown Scott, Secretary of the Endowment and Director of its Division of International Law, was at that time Recording Secretary of the Society and Editor-in-Chief of the *AMERICAN JOURNAL OF INTERNATIONAL LAW*. Under the guidance of Mr. Root, Dr. Scott and their many distinguished colleagues and successors, the Society and its *JOURNAL* have had an outstanding career for forty-four years. In transferring its activities to another scene, the Society expects to carry forward successfully the career which began and flourished so long under the auspicious conditions of the past.

INCREASE IN MEMBERSHIP DUES

The American Society of International Law at its annual meeting in Washington on April 28, 1950, adopted an amendment to the Society's Constitution abolishing the fee of \$5.00 for annual dues and conferring discretion on the Executive Council to fix the amount.¹ Accordingly, the Executive Council at its meeting on April 29, 1950, voted to raise the annual membership dues from \$5.00 to \$7.50. At the same time the Council amended its regulations concerning student membership dues, raising the annual fee from \$3.00 to \$4.00. It also raised the contributing membership fee from \$10.00 to \$15.00.

The subscription price of the *JOURNAL* was raised from \$5.00 to \$7.50 a year, and the price of single numbers from \$1.50 to \$2.00. The price of the *Proceedings* was increased from \$1.50 to \$2.50 a volume.

The increase in membership and subscription fees was made effective as of the close of the annual meeting for new members and subscribers. The new membership dues will apply on January 1, 1951, to those already members at the time of the last annual meeting.

¹ For text of amendment see this *JOURNAL*, Vol. 43 (July, 1949), p. 523.

This is the first increase in the annual dues and subscriptions since the Society and JOURNAL were founded forty-four years ago. The action was taken with the greatest reluctance, and was made necessary by the annual increases in the cost of publishing which the Society has had to meet for a number of successive years.

ANNUAL MEETING OF THE SOCIETY

The Forty-Fourth Annual Meeting of the Society was held at the Carlton Hotel, Washington, D. C., from April 27 to April 29 last. The general theme of the meeting was "World Security and International Law at Mid-Century." In order to provide more time for discussion, the meeting began on Thursday afternoon, April 27, instead of on Thursday evening. The opening session was devoted to a panel discussion of "World Security and Regional Arrangements" under the chairmanship of Professor Myres S. McDougal of Yale University Law School. The members of the panel consisted of Professor Harold D. Lasswell, Yale University Law School, who discussed "Conditions of Security in a Bi-Polarizing World"; Mr. Walter S. Surrey, Mutual Defense Assistance Program, Department of State, who spoke on "Regional Arrangements in the Atlantic Community"; Mr. Sergius Yakobson, of the Legislative Reference Service, Library of Congress, who discussed "Regional Arrangements in the Soviet System"; and Dr. Grayson Kirk, Provost of Columbia University, whose theme was "The Future of Regional Arrangements." The discussion leaders at this session were Mr. Elton Atwater of American University; Professor Hardy C. Dillard of the University of Virginia; Professor Brunson MacChesney of Northwestern University; Professor Henry Reiff of St. Lawrence University; and Mr. David Wainhouse of the Department of State.

On Thursday evening, President Manley O. Hudson addressed the Society on "International Law at Mid-Century." In opening the evening session President Hudson read messages of congratulation to the Society from the President of the United States, and the governments of Mexico, Peru, Turkey, and Uruguay. Following President Hudson's address, Mr. John Foster Dulles, Consultant to the Secretary of State, delivered an address on "New Aspects of American Foreign Policy."

On Friday afternoon, April 28, a panel discussion was held on the subject of "Freedom of Communication across National Frontiers." The panel members were Professor Quincy Wright of the University of Chicago, Dr. Charles G. Fenwick, Director, Department of International Law and Organization of the Pan American Union, and John N. Hazard of Columbia University. Professor Wright discussed the subject of "Freedom and Responsibility in Respect to Trans-National Communication." Dr. Fenwick discussed the question "Is There an International Obligation to Permit Freedom of Communication?" "The Soviet Union and Free-

dom of Communication" was the subject of Mr. Hazard's remarks. Discussion leaders at this session were Professor Charles Fairman, Stanford University; Alwyn V. Freeman, of the Inter-American Juridical Committee; James Hyde, of the United States Mission to the United Nations; Philip W. Thayer, of the School of Advanced International Studies; Professor John B. Whitton, of Princeton University; and Dr. Helen Dwight Reid of the United States Office of Education.

The subject of the discussion on Friday evening, was "Strengthening the United Nations." Professor Clyde Eagleton of New York University acted as chairman of the panel, which consisted of Mr. Harding F. Bancroft, Director, Office of United Nations Political and Security Affairs, Department of State; Professor Leland Goodrich of Brown University; Dr. Ivan Kerno, Assistant Secretary General in Charge of Legal Affairs, United Nations; Louis B. Sohn, Legal Department, United Nations Secretariat; and Mr. Arthur Sweetser, Director of the United Nations Information Office in Washington. The discussion leaders were Professor Edward H. Buehrig, Indiana University; Professor Kenneth S. Carlston, University of Illinois Law School; Sheldon Z. Kaplan, Staff Member, House Foreign Affairs Committee; Professor Ivan M. Stone of Beloit College; and Richard W. Van Wagenen of Duke University.

On Saturday morning, April 29, the panel discussion was devoted to the subject of "New Developments in Recognition." Professor Herbert W. Briggs, of Cornell University spoke on "Recognition of States, with Special Reference to the United Nations," and the Honorable Stanley K. Hornbeck, former United States Ambassador to The Netherlands, discussed "Recognition of Governments, with Special Reference to China." The following acted as discussion leaders: Professor Edwin D. Dickinson, University of Pennsylvania Law School; Professor Salo Engel, University of Tennessee; Professor Leo Gross, Fletcher School of Law and Diplomacy; Professor Hans J. Morgenthau, University of Chicago; Professor Norman J. Padelford, Massachusetts Institute of Technology; and Professor Lawrence Preuss, University of Michigan.

The business meeting of the Society was held on Friday morning, April 28, 1950, followed by a discussion of the previous addresses. The Society at its business meeting adopted three amendments to its Constitution, one relating to annual membership dues, referred to above, one relating to submission of resolutions relating to principles of international law or to international relations,¹ and one providing for the appointment of an Assistant Treasurer of the Society.² M. Georges Scelle, Professor of International Law at the University of Paris, and member of the United Nations International Law Commission, was elected an honorary member of the Society. President Manley O. Hudson was reelected for the coming year.

¹ For text, see this JOURNAL, Vol. 43 (July, 1949), p. 523.

² For text, see this JOURNAL, Vol. 43 (October, 1949), p. 776.

Other officers reelected were: Secretary of State Dean G. Acheson, Honorary President; the Honorable Philip C. Jessup, Edwin D. Dickinson and George A. Finch, Vice Presidents. The present Honorary Vice Presidents were also reelected. The following were elected to the Executive Council to serve until 1953: The Honorable Adrian Fisher, Legal Adviser, Department of State, Professor Charles Fairman, Professor Valentine Jobst III, Professor Oliver J. Lissitzyn, Dr. Phoebe Morrison, Professor Norman J. Padelford, Professor William Gorham Rice, and Dr. Francis O. Wilcox.

The annual dinner which closed the meeting on Saturday evening, April 29, was attended by over two hundred members and their guests, including government officials and members of the diplomatic corps. President Hudson presided. His Excellency Dr. E. N. van Kleffens, Ambassador of The Netherlands, delivered an after-dinner address on the responsibility of states in international law for subversive activities against other governments. He was followed by Mr. Paul Hoffman, Administrator of the Economic Coöperation Administration, who spoke on "World Security and the European Recovery Program." Dr. Ivan Kerno, Assistant Secretary General in charge of Legal Affairs, United Nations, made an informal address on the place of the United Nations Charter in international law.

ELEANOR H. FINCH
Executive Secretary

TRANSFER OF SOVEREIGNTY OVER INDONESIA

A series of events of remarkable significance in international law took place in 1949 when the Kingdom of The Netherlands transferred sovereignty over Indonesia to the newly established Republic of the United States of Indonesia (*Republik Indonesia Serikat*). After four years of serious contention the Indonesian dispute neared final settlement in 1949 through a course of statesmanlike measures taken by representatives of The Netherlands and Indonesia, with the assistance of the United Nations Commission for Indonesia. Acting under the Security Council's resolution of January 28, 1949, the Commission and the parties met at Batavia in the spring and summer of 1949. During that period preliminary agreements were reached which led to the convening of a Round Table Conference at The Hague, participated in by representatives of The Netherlands, the various Indonesian states and territories and the United Nations Commission.

Representatives of various states and provinces in Indonesia had met during July and August, 1949, to draft a provisional constitution for the Republic of the United States of Indonesia. The provisional constitution, which consists of 197 articles and an appendix, represents an admixture of concepts, principles and institutions from several constitutional sources, including the United States of America. A copy of the

completed provisional constitution was presented to the Hague Conference by the Indonesian representatives, but no action upon it was taken at the Conference because the constitution was regarded as an internal Indonesian matter.¹

The Hague Conference was in session from August until November 2, 1949, and worked out the terms and details under which sovereignty was transferred to the new independent nation. The agreements reached between the parties at the Conference cover a wide range of problems in international and domestic law. English texts of these agreements and of the provisional constitution of the Republic of the United States of Indonesia have been published by the United Nations.²

At the conclusion of the Conference on November 2, 1949, the parties framed a Covering Resolution embracing, for purposes of acceptance and ratification, the various other specific agreements drafted by the parties. The Resolution set forth the circumstances under which the Hague agreements and supplementary exchange of letters were to be accepted and ratified by the Kingdom of The Netherlands on the one side and the territories acceding to the Republic of the United States of Indonesia on the other. Further, it was specified that the United Nations Commission for Indonesia or another United Nations agency should observe in Indonesia the implementation of the agreements. Significantly illustrating the growing use of English as an official language in international relations, the Resolution provided that the documents to be ratified were to be drawn up in the Netherland and Indonesian languages, having equal value, and that an official English text should prevail in case of divergent interpretations of the Netherland and Indonesian texts.

The Covering Resolution provided that the following agreements were subject to ratification by the parties:

A. *The Charter of Transfer of Sovereignty.* This instrument provides for the transfer by The Netherlands and acceptance by the Republic of the United States of Indonesia of complete and unconditional sovereignty over Indonesia. Further, because it had not been possible to reconcile the views of the parties as to the future status of Netherlands New Guinea, the Charter provides that the *status quo* (Netherlands sovereignty) in that territory should continue, with the stipulation that the parties determine New Guinea's status within one year.

¹ Since the transfer of sovereignty far-reaching changes have taken place in the internal structure of the Republic of the United States of Indonesia. Questions concerning the ultimate national and international consequences of these changes remain to be determined.

² See U.N. Doc. S/1417, Add. 1, Nov. 14, 1949, United Nations Commission for Indonesia: Appendices to the Special Report to the Security Council on the Round Table Conference. Inasmuch as all the Conference's documents referred to in this note are included in the United Nations document, no separate citations to them will be given.

B. *The Statute of the Netherlands Indonesian Union.* The Union Statute delineates the structure and powers of the Netherlands Indonesian Union, a voluntary relationship in which both parties possess an equal voice so that Union decisions can be made only upon the agreement of each partner. The Statute provides that the organs of the Union shall consist of a Head, a Conference of Ministers, a Court of Arbitration, and a Secretariat.

The instrument provides that the Union Statute may be registered with the United Nations in accordance with Article 102 of the United Nations Charter. This provision assumes special significance for the future in the light of the wide scope of the several agreements supplementing the Union Statute. Special agreements deal with coöperation in foreign relations, financial and economic relations, and cultural relations. It is also noteworthy that an enumeration of fundamental human rights and freedoms recognized by the partners is appended to the Statute. These principles are closely similar to the fundamental rights set forth in the provisional Indonesian constitution and resemble many of the provisions in the United Nations Declaration of Human Rights.

C. *Agreement on Transitional Measures.* From the standpoint of international law the Agreement on Transitional Measures embodies several of the most significant elements of the Hague settlement. This document provides for the transfer *ipso jure* of all rights and obligations under private and public law of the previous Netherlands Government in Indonesia to the Republic of the United States of Indonesia, unless stipulated to the contrary in the agreements which supplement the Union Statute. Moreover, certain rights and obligations resulting from treaties and international agreements and from contracts concluded by the Governor General with self-governing regions in Indonesia were transferred to and assumed by the new Republic. Further, this document and other agreements supplementary to it provide for: a plebiscite (to be planned and carried out with the assistance of a United Nations Commission) to determine whether certain territories shall become component states of the new nation; terms for "allocation" of citizens; withdrawal of armed forces; and arrangements concerning the legal status of civil servants. Other paragraphs of the Agreement declare that the two governments shall coöperate, consult, and assist each other in the coördination of their foreign policies.

In the seven weeks following the conclusion of the Round Table Conference The Netherlands and each of the territories acceding to the Republic of the United States of Indonesia accepted the Conference's agreements in accordance with the terms of the Covering Resolution. This action prepared the way for the actual transfer of sovereignty which was dramatically consummated at a formal ceremony on December 27, 1949.

There were three operative steps in this proceeding.⁸ First, the Prime Minister of The Netherlands and the Prime Minister of the Republic of the United States of Indonesia signed a Protocol which, taking into account the pertinent provisions of the Netherlands Constitution and the acceptance of the Covering Resolution by the sixteen Indonesian territories, stated the understanding of the parties that the draft agreements and exchange of letters had been accepted by both sides so that consequently "the new order of law" was established. Secondly, by an Act of Confirmation the Queen of The Netherlands proclaimed her assent and that of the Netherlands Cabinet to the new order transferring sovereignty. The final measure was the promulgation and acceptance of the Act of Transfer of Sovereignty and Recognition. The Act stated that sovereignty was transferred in accordance with the Charter of the Transfer of Sovereignty, that the Netherlands Indonesian Union was formed, and that all further results of the Round Table Conference contained in documents subordinate to the Covering Resolution had come into force. The Act was signed on the one hand by the Queen of The Netherlands and the Netherlands Cabinet and on the other, by the Prime Minister of the Republic of the United States of Indonesia and other members of the Indonesian Delegation. The Indonesian Delegation declared the acceptance of sovereignty on behalf of the Republic of the United States of Indonesia in accordance with the above-mentioned Act, and agreed to "effecting" the Netherlands Indonesian Union and to all that was further understood in the Act.

A few hours later another ceremony was held in Djakarta (Batavia) celebrating the transfer of sovereignty and the formal assumption of authority by the Republic of the United States of Indonesia which had been established under the provisional constitution.

HOMER G. ANGELO*

THE PROCLAIMING OF TREATIES IN THE UNITED STATES

Among other things undergoing transformation these days is the treaty-making process of the United States. Because of the increasing variety of international agreements and the diversification of the modes of bringing them into effect internationally and domestically,¹ it is possible that litigation may arise involving specifically the question of when a particular agreement became binding on the United States or when it began to operate as law in the domestic order. Not much has been written in

⁸ Official English translations of the Protocol, Act of Confirmation, and Act of Transfer are not yet available in the United States.

* The views expressed in this note are the personal views of the author only.

¹ Cf. Yuen-li Liang, "The Use of the Term 'Acceptance,' in the United Nations Treaty Practice," this JOURNAL, Vol. 44 (1950), p. 342; H. W. Briggs, "United States Treaty Developments," *ibid.*, p. 370.

this field.² It is deemed desirable, therefore, to bring to the attention of the fraternity certain points made in a generously long letter to the writer by the Honorable Hunter Miller, on the subject of proclaiming treaties in the United States, written August 4, 1936.³

The present writer in an article in this JOURNAL⁴ in January, 1936, concluded that the proclaiming of treaties is not essential to their validity as law of the land; that treaties become effective domestically when they come into force internationally; and that the President's proclamation serves to announce facts with regard to the perfecting of the treaty internationally and to enjoin obedience. Dr. Miller concurred in these conclusions⁵ and not only supplied additional historical data in support of them but also extended the discussion of the central problem examined in that article. The gist of those data and observations is given below.

(1) *Early practice involving secrecy.* The Founding Fathers were familiar with secret treaties and statutes. The Treaties of Amity and Commerce⁶ and of Alliance of 1778 with France⁷ and the Preliminary Articles of Peace of 1782 with Great Britain⁸ had secret aspects. This may help explain the silence in the Constitutional Convention of 1787 on the subject of proclaiming treaties. The Act of June 14, 1790,⁹ providing for the publication of treaties "made and promulged [*sic!*]" in the future implied the possibility that certain treaties might be made which would *not* be proclaimed. Congress passed secret statutes in the period 1811-1813 which were kept out of the books for years. A secret

² Cf. Hunter Miller, *Treaties and Other International Acts of the United States of America*, Vol. I (Short Print), pp. 19-20; H. Reiff, "The Proclaiming of Treaties in the United States," this JOURNAL, Vol. 30 (1936), pp. 63-79; Hackworth, *Digest of International Law*, Vol. V, pp. 84-87; C. C. Hyde, *International Law* (2d ed.), Vol. II, pp. 1448-1449; H. M. Catudal, "Executive Agreements: A Supplement to the Treaty-Making Procedure," 10 *George Washington Law Review* (1942) 653-669; *id.*, "Executive Agreement or Treaty?," 10 *The Journal of Politics* (1947) 168-178. For a brief note on the nature and use of the President's proclamation generally, but not specifically in relation to treaties, cf. E. S. Corwin, *The President: Office and Powers* (New York, 1940), p. 363, note 10. Cf. also the comprehensive note on the general subject of introduction into the municipal order by H. W. Briggs, *The Law of Nations: Cases, Documents, and Notes* (New York, 1938), pp. 432-436.

³ Dr. Miller graciously consented to this use of his original letter in a letter dated May 6, 1950.

⁴ Cited *supra*, note 2.

⁵ He pointed out, however, that Jefferson, when President, appeared to believe that proclamation of a treaty was essential to its status as law of the land. Jefferson's language in II Miller 484.

⁶ *Ibid.*, pp. 3, 30-31. The French Government resented alleged premature publication by the United States.

⁷ U. S. Department of State, Treaty Series No. 83, II Miller 45, Act Separate and Secret.

⁸ Treaty Series No. 102, II Miller 96, 101, 105; separate article intended to be secret.

⁹ 1 Stat. 187. Quoted by Reiff, *loc. cit.*, p. 69, note 42.

treaty was made in 1790 with the Creek Indians.¹⁰ Secret articles accompanied the treaty of 1830 with Turkey¹¹ and the Treaty of Guadalupe Hidalgo of 1848.¹² A secret treaty obviously cannot be proclaimed. It would nevertheless be as much law of the land as a secret statute or a treaty which has been proclaimed.

(2) *Publicity for treaties.* Promulgation of treaties may be regarded as one phase of "open diplomacy." Nevertheless, during a great part of our history proclamation did not ensure factual publicity throughout the country. That depended upon the means of communication and the policy of such papers as *The National Intelligencer* in printing the texts of proclaimed treaties. Proclamation thus, in effect, amounted to mere release of the text. Present-day legislation requiring publication immediately upon proclamation more nearly assures immediate general knowledge of a treaty as law of the land. Similar observations can be made about publicity for statutes.

(3) *Interval between date of effectiveness of a treaty internationally and date of proclamation.* Under slow means of communication this interval could run into weeks and months. An extreme case was the proclaiming of the treaty of 1833 with Siam over fourteen months after exchange of ratifications at Bangkok.¹³ In some cases, proclamation has been overlooked for a time. In one case it was apparently overlooked entirely.¹⁴ Nowadays, however, a treaty may be and frequently is proclaimed on the date of the exchange or deposit of ratifications; at any rate, the interval between the date of effectiveness internationally and the date of proclamation is now ordinarily brief.

(4) *Proclamation prior to date of effectiveness.* Addressing himself to the problem of proclaiming instruments whose effectiveness as treaties is made dependent upon conditions subsequent, Dr. Miller, after noting that the matter has been under discussion in and out of the Department

¹⁰ Aug. 7, 1790, public articles in 7 Stat. 35; secret articles in II Miller 343-345.

¹¹ Treaty of Commerce and Navigation, May 7, 1830, Treaty Series No. 267, III Miller 541, 575.

¹² With Mexico, Feb. 2, 1848, Treaty Series No. 207, V. Miller 207, 245. While in the case of each of these secret articles, the Senate refused advice and consent, "the objections in each case seem to have been on the merits."

¹³ Treaty of Amity and Commerce, signed at Bangkok, March 30, 1833; ratifications exchanged at Bangkok April 14, 1836; proclaimed June 24, 1837. Treaty Series No. 321, III Miller 741.

¹⁴ Exchange of Official, Scientific, Literary, and Industrial Publications, Jan. 27, 1902, Mexico City, Pan American multilateral agreement, Treaty Series No. 491-A. There is no copy of this agreement in Malloy, but copies may be found in Department of State Treaty Information Bulletin, No. 23, August, 1931, p. 20, and in the Report of the Delegates of the United States to the Second International Conference of American States (Sen. Doc. No. 330, 57 Cong., 1 Sess.), p. 213.

of State for some time, particularly after the decision in the *Factor v. Laubenheimer* case,¹⁵ examined four types of situations:

(a) Where a mere lapse of time is stipulated, such as six months after the exchange of ratifications. Barring certain remote contingencies, such as war, a superseding agreement, or termination of the international personality of one of the parties, the condition as such is certain to be fulfilled.

(b) Where the event is certain but the time uncertain; for example, where a treaty is to come into force at the end of the reign of the present monarch of State A. Clauses akin to this type are sometimes inserted in extradition treaties, as where the effectiveness of the agreement is conditioned upon promulgation in the two countries. The supposition here is that promulgation will take place promptly, within a few days or weeks. Where there is excessive delay it might not be unreasonable for the party which has promulgated to say that the other party must either publish or abandon the agreement.¹⁶ Clauses of this character may also be found in other types of treaties.¹⁷

(c) Where the effectiveness of a treaty depends upon a condition subsequent, limited in respect of time, but uncertain as to event. Such would be an agreement contemplating the passage of legisla-

¹⁵ *Factor v. Laubenheimer*, U. S. Marshal, et al., 290 U. S. 276 (1933), this JOURNAL, Vol. 28 (1934), p. 149. The extradition treaty of Dec. 22, 1931, between the United States and Great Britain, was involved in this case. "Article 18 of the treaty provided that it was to 'come into force ten days after its publication, in conformity with the forms prescribed by the laws of the high contracting parties.' Ratifications were exchanged at London, August 4, 1932; the President issued a proclamation in the usual form containing the treaty, as of the date August 9, 1932; but the British Government withheld the issuance of an Order-in-Council containing the treaty, apparently to avoid affecting the result in the *Factor* Case. Counsel for the petitioner argued that the treaty was in force, but the Supreme Court, without going into the merits of the contention, followed the State Department, which appeared not to have recognized the treaty as in force in either country." (Footnotes omitted.) Article by Reiff (cited *supra*, note 2), at p. 63. For discussion of the *Factor* Case, cf. M. O. Hudson, "The *Factor* Case and Double Criminality in Extradition," this JOURNAL, Vol. 28 (1934), pp. 274, 276; E. M. Borchard, "The *Factor* Extradition Case," *ibid.*, p. 742; R. E. Cushman, "Constitutional Law in 1933-34," American Political Science Review, Vol. 29 (1935), pp. 36, 44.

¹⁶ In the case of the extradition treaty with Great Britain, *supra*, ratifications were exchanged at London, August 4, 1932; proclamation by the President issued August 9, 1932; but the Order-in-Council was not issued until June 6, 1935. Note by the Department of State in Treaty Series No. 849. Dr. Miller comments: "In my own opinion a proclamation [by the United States] in that case was properly issued. . . . The remedy in all such cases [of treaties stipulating promulgation for effectiveness] is a simple one, namely, to put in a time clause for the promulgation on each side. That would express what the parties really mean. . . . Three months or six months would give ample time."

¹⁷ Convention between the United States and Rumania for the Reciprocal Protection of Trade Marks, signed at Bucharest, March 18/31, 1906, Art. III (Treaty Series No. 451).

tion within the stipulated time. The Reciprocity Convention of January 20, 1883, with Mexico, contained such a clause. It was proclaimed, but, since no legislation was ever adopted, even within an extended period, the agreement never went into effect.¹⁸

(d) Where there may also be more than one condition subsequent, contemplating the passage of legislation, in the same treaty, as in that of June 5, 1854, with Great Britain.¹⁹

With respect to each of these types of situations, Dr. Miller is of the opinion that proclamation should issue, even if there is a possibility that the instrument may not become effective as an international agreement at all.

(5) *The present day value of proclaiming treaties.* As devices to release texts, treaty proclamations may be said to have almost ceased to have practical importance. Nowadays, the texts of most treaties are available to the public before proclamation. Aside from policy considerations with respect to the making of secret treaties, it is difficult to keep any really important treaty secret until proclamation. The Jay Treaty became public before ratifications were exchanged; the *New York Herald* printed the text of the Treaty of Guadalupe Hidalgo as soon as the Senate had acted, although the administration at that time desired secrecy. Presidential release of a text, release by the other party, printing in the *Congressional Record* when the Senate acts, publication of multilateral agreements by international conferences, abandonment of secret executive sessions by the Senate in recent years, discussion of a treaty in public committee hearings—all these practices militate against keeping treaties in a confidential category until proclaimed. Hence, whatever other purposes the proclamation of a treaty may still serve, it no longer serves to release the text of a treaty.

HENRY REIFF

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¹⁸ I Malloy 1146-1157. For an interesting instance of hesitation see the Convention with France Regarding Claims and Regarding Duties on Wines and Cottons, signed at Paris, July 4, 1831 (Treaty Series No. 88). Ratified by the United States, Feb. 2, 1832; by France, Aug. 31, 1831; ratifications exchanged at Washington, Feb. 2, 1832. Proclamation signed on Feb. 2, 1832, but not issued until July 13, 1832, when it was given this latter date, on passage of enforcing legislation dated July 13, 1832 (4 Stat. 574). III Miller 641, note on this peculiar postponement at p. 648.

¹⁹ Treaty with Great Britain Regarding the North Atlantic Fisheries, Commercial Reciprocity with British North American Colonies, and Navigation etc., signed at Washington, June 5, 1854 (Treaty Series No. 124). Art. V conditioned effectiveness of the treaty on passage of legislation by the British Parliament, the British North American Colonies affected by the treaty, and Congress. Art. VI conditioned effectiveness of the treaty in relation to Newfoundland on passage of legislation by the Provincial Parliament of Newfoundland, the British Parliament, and Congress. VI Miller 667, 734, 737.

STATE vs. NATION: FRESH EVIDENCE ADMITTED—ISSUE HELD NON-JUSTICIABLE

Mr. William Gorham Rice in a provocative note¹ has appealed for the rejection of the term "state" as a term of international law, and he has referred to it as "so unsatisfactory that . . . we should replace it by 'nation.'" Being, however, as yet unconvinced of any intrinsic advantage which might be the consequence—logical or otherwise—of this enshrinement of "nation" in the terminology of international law, the present writer feels compelled to admit fresh evidence as submitted by the proponents of "state," and to reconsider the issue.

It may be emphasized at the outset that we are considering the term "state" as a term of international law, and that we must therefore reluctantly conclude that all the arguments pertaining to its use in a municipal law sense are *obiter dicta*. Only from the standpoint of interesting comparison is it within our competence to refer to them. It may also be stressed that there is no dispute with regard to the traditional use of the terms "international law" and "law of nations." But the reference to their equivalents in French cannot be let to pass so easily. Of course, as Mr. Rice says, it is the *droit international* and the *droit des gens*, and not the "*droit des états*"; however, the admission of the fact that neither is it the "*droit des nations*" lends an illusory, if not misleading air.

Turning now to the text of the judgment, we are told that "the chief argument for 'nation' is that in its international law sense it is already accepted." Various expressions in common use are then cited as conclusive evidence on this point; namely, "the family of nations," the "League of Nations," and the "United Nations." Bearing in mind, however, that we are only concerned with the term "nation" "*in its international law sense*," we can reject these examples as inadmissible: the phrase "the family of nations," is properly to be regarded as synonymous with such other general phrases as "the international community," and "international society"; and the "League of Nations" and the "United Nations" are strictly titles of international organizations. Moreover, with regard to the "United Nations," since the prefix "United" was essential to describe accurately an international organization dedicated to the achievement of common purposes, some alternative to "states" had to be found.

Furthermore, it may be observed that current practice affords scant evidence in support of the holding that "nation" is already accepted in international law. On the contrary, it would certainly appear that the term "state" has played a dominant rôle in the terminology of the major international documents of recent times. As a prime example we may turn to the text of the Charter of the United Nations which is particularly enlightening in this respect. Article 3 stipulates that "the original Members of the United Nations shall be the *states* which having participated in the United Nations conference . . ."; and Article 4 likewise provides that

¹ This JOURNAL, Vol. 44 (1950), p. 162.

"Membership in the United Nations is open to all other peace-loving *states*" (Italics added). It may be remarked that this practice is followed throughout the Charter.

The statute of the International Court of Justice is similarly consistent in providing that "only *states* may be parties in cases before the Court"² (Italics added). The Court itself has upheld the use of this language. Thus, as an example among many, in its advisory opinion on "Reparation for Injuries Suffered in the Service of the United Nations,"³ the term "state" is solely to be found.

For additional corroboration as to the terminology favored among the most learned publicists on international law, we may take note that Oppenheim maintains that "*states* are the principal subjects of international law,"⁴ (Italics added) and that Fauchille writes:

*Le droit international public ou droit des gens est l'ensemble des règles qui déterminent les droits et les devoirs respectifs des états dans leurs mutuelles relations.*⁵ (Underlining added.)

In view of this evidence, it can hardly be maintained that the term "state" is viewed with general disapprobation. Moreover, despite the dictum that "state is an unsatisfactory tool," its insusceptibility in this regard has at least spared us from similar "cannibalizations" conceived as the derivatives of "nation," as "innational" and "nationdom," and appears to have served us well with "stateless" and "statehood," both of which are neither too incomprehensible nor unpronounceable. Nevertheless, it would be improper and wearisome to set out an exhaustive list of legal terms in frequent use connoting some aspect of the term "state," which would include "federal state," "unitary state," "naturalized state," "state immunity," and "recognition of states," since such a list would weigh too heavily against the term "nation."

Summing up, it may be seriously questioned whether the onus of proving that "nation" is a term of international law has been satisfactorily discharged. Whereas "state" as a term of international law permits of definition, albeit imprecise, "nation" in this sense can make no claim to such distinction. Indeed, most dictionaries refer to it as a word lacking legal significance, which is used loosely to mean "people" or "race." Thus, the issue of whether "nation" should replace "state" must be held to be non-justiciable. *De rebus non juridicis lex non curat.*

MICHAEL BRANDON

*Legal Department, United Nations Secretariat **

² Article 34(1).

³ I.C.J. Reports, 1949, p. 174.

⁴ Oppenheim's International Law (7th ed. by Lauterpacht), p. 19.

⁵ Fauchille, P., *Traité de Droit International Public*, Tome I, Part I, p. 4.

* The views expressed in this note are the personal views of the author.

JUDICIAL DECISIONS *

BY WILLIAM W. BISHOP, JR.

Of the Board of Editors

[With the assistance of Miss Tommy F. Angell and Mr. Richard P. Bray, made possible by the W. W. Cook Legal Research Endowment of the University of Michigan Law School.]

THE CORFU CHANNEL CASE (ASSESSMENT OF THE AMOUNT OF COMPENSATION). I. C. J. Reports, 1949, p. 244.

International Court of Justice, December 15, 1949.

*Assessment of amount of compensation due on account of acts involving the international responsibility of a State.—Objection to the Court's jurisdiction; res judicata.—Procedure in default.—Application and interpretation of Article 53 of the Statute.—Technical nature of the questions involved.—Warships.—Enquiry by experts.—Measure of compensation.—Documentary evidence.***

In its judgment of April 9, 1949, I. C. J. Reports, 1949, p. 4, this JOURNAL, Vol. 43 (1949), p. 558, the Court declared Albania responsible under international law for the damage to property and loss of life suffered by British vessels in the explosions of October 22, 1946, in Albanian waters. It decided that it had jurisdiction to assess the amount of compensation, but refrained from fixing the amount, since Albania had not stated what claims it contested and the United Kingdom had not submitted evidence as to damages. It fixed June 25, 1949, as the time limit for the observations of the Albanian Government, July 25, 1949, for the British reply, and August 25, 1949, for the Albanian reply. After an extension of time to July 1 had been accorded Albania, in a letter dated June 29 the Albanian Agent informed the Court that in the opinion of his government "the Special Agreement did not provide that the Court should have the right to fix the amount of the compensation and, consequently, to ask Albania for information on that subject." The United Kingdom filed its observations, but the Albanian Government filed no reply or other document, reiterating its opinion by telegram on November 15, 1949, and stating that the Albanian Government did not consider it necessary to be represented at the hearing.

In the present proceedings, the Court said:

At the public hearing on November 17th, the Court heard statements by Sir Eric Beckett, K. C., Agent, and Sir Frank Soskice, K. C., Counsel, for

* Space limitations prevent digesting of cases on deportation, enemy property, etc., and the publication of a list of cases not digested.

** Caption by the Court.

the United Kingdom. The latter asked the Court to give judgment that the amount of compensation due was the amount stated in the final submissions contained in the written Observations of the United Kingdom dated July 28th, 1949, namely:

in respect of H.M.S. <i>Saumarez</i>	£ 700,087
in respect of H.M.S. <i>Volage</i>	£ 93,812
in respect of deaths and injuries of naval personnel	£ 50,048
Total	<u>£ 843,947</u>

The Albanian Government was absent and made no submissions.

At the same sitting, after the Agent for the United Kingdom Government had been heard, the President announced that the Court had decided, in pursuance of paragraph 2 of Article 53 of the Statute, to examine the figures and estimates submitted by the United Kingdom Government, and, in conformity with Article 50 of the Statute, to entrust this investigation to experts as it involved questions of a technical nature.

On the expiry of the time-limit granted to the Parties for the submission of their written observations, a letter signed by the Albanian Chargé d'Affaires in Paris, and dated December 10th, 1949, was handed to the Registrar of the Court. This letter asked for a change in the procedure instituted by the Court for the submission of observations and, failing that, for a prolongation of the appointed time-limit until December 23rd. The Court points out that it has given ample opportunity to the Albanian Government to defend its case; that, instead of availing itself of this opportunity, that Government has twice disputed the Court's jurisdiction in the present part of the proceedings, that it did not file submissions and declined to appear at the public hearing on November 17th. In those circumstances the Court cannot grant the request of the Albanian Government.

As has been said above, the Albanian Government disputed the jurisdiction of the Court with regard to the assessment of damages. The Court may confine itself to stating that this jurisdiction was established by its Judgment of April 9th, 1949; that, in accordance with the Statute (Article 60), which, for the settlement of the present dispute, is binding upon the Albanian Government, that Judgment is final and without appeal, and that therefore the matter is *res judicata*.

The position adopted by the Albanian Government brings into operation Article 53 of the Statute, which applies to procedure in default of appearance. This Article entitles the United Kingdom Government to call upon the Court to decide in favour of its claim, and, on the other hand, obliges the Court to satisfy itself that the claim is well founded in fact and law. While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy

in all their details; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded.

It was in view of these considerations and on account of the technical nature of the questions involved in the assessment of compensation in the present case that the Court ordered the expert enquiry mentioned above.

The claim of the United Kingdom Government is under three separate heads which will be considered in succession.

1. *Loss of the destroyer "Saumarez"*

In the final submissions contained in its written Observations of July 28th, 1949, and maintained in its oral statement of November 17th, 1949, the United Kingdom Government estimates the damage sustained by the total loss of the destroyer *Saumarez* at £700,087; this sum represents the replacement value of the ship at the time of its loss in 1946 (after deducting the value of usable parts—equipment, scrap), and the value of stores that must be considered as lost.

The experts, for their part, estimated the whole of this damage at a somewhat higher figure, £716,780.

The Court considers the true measure of compensation in the present case to be the replacement cost of the *Saumarez* at the time of its loss. The Court is of the opinion that the amount of compensation claimed by the United Kingdom Government has been justified. It cannot award more than the amount claimed in the submissions of the United Kingdom Government.

2. *Damage to the destroyer "Volage"*

In the final submissions as stated in its written Observations of July 28th, 1949, and maintained in its statement in Court, the United Kingdom Government, under the head of damage caused to this vessel, claimed a sum of £93,812. The slightly lower figure of the experts, £90,800, may, as their Report points out, be explained by the necessarily approximate nature of the valuation, especially as regards stores and equipment.

The Court considers that the figures submitted by the United Kingdom Government are reasonable and that its claim is well founded. In this matter it takes note of the following conclusion in the experts' Report: "During their enquiry and calculations, and as a result of their experience and of the information placed before them, the experts have become convinced that the claim of £793,899 submitted by the United Kingdom Government may be taken as a fair and accurate estimate of the damage sustained."

3. *Claims in respect of deaths and injuries of naval personnel*

In the final submissions as stated in its written Observations of July 28th, 1949, and maintained in its statement in Court, the United Kingdom Gov-

ernment claimed under this head a sum of £ 50,048, representing the cost of pensions and other grants made by it to victims of their dependents, and for costs of administration, medical treatment, etc.

This expenditure has been proved to the satisfaction of the Court by the documents produced by the United Kingdom Government as Annexes 12 and 13 to its Memorial, and by the supplementary information and corrections made thereto in Appendices I, II and III of that Government's Observations of July 28th, 1949.

Finally, the Court points out that the United Kingdom Government, in paragraph 6 of its written Observations of July 28th, 1949, mentioned certain damage, for which it expressly stated that it did not ask for compensation. The Court need therefore express no view on this subject.

FOR THESE REASONS,
THE COURT,
by twelve votes to two,

Gives judgment in favour of the claim of the Government of the United Kingdom, and

Fixes the amount of compensation due from the People's Republic of Albania to the United Kingdom at £ 843,947.

Judge KRYLOV declares that he is unable to agree either with the operative clause or with the reasons for the Judgment.

Judge EČER, judge *ad hoc*, declaring that he is unable to concur in the Judgment of the Court, has availed himself of the right conferred on him by Article 57 of the Statute and appended to the Judgment a statement of his dissenting opinion.*

COMPETENCE OF THE GENERAL ASSEMBLY FOR THE ADMISSION OF A
STATE TO THE UNITED NATIONS. I. C. J. Reports, 1950, p. 4.¹
International Court of Justice, Advisory Opinion, March 3, 1950.

*Competence of the Court to interpret Article 4, paragraph 2, of the Charter.—Character of the question.—Absence of recommendation from the Security Council regarding admission to the United Nations.—Power of the General Assembly regarding admission to membership in the United Nations in the absence of a recommendation of the Security Council.—Meaning of the term "upon the recommendation of the Security Council."—Interpretation of a treaty provision according to its natural and ordinary meaning in its context.—Travaux préparatoires.—Interpretation in the light of the general structure of the Charter.—Application of Article 4, paragraph 2, by the General Assembly and the Security Council.***

* Not published here.

¹ Excerpted text of Advisory Opinion.

** Caption by the Court.

On November 22nd, 1949, the General Assembly of the United Nations adopted the following Resolution:

“The General Assembly,
Keeping in mind the discussion concerning the admission of new Members in the *Ad Hoc* Political Committee at its fourth regular session,
Requests the International Court of Justice to give an advisory opinion on the following question:

‘Can the admission of a State to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend?’ ”

.

The Request for an Opinion calls upon the Court to interpret Article 4, paragraph 2, of the Charter. Before examining the merits of the question submitted to it, the Court must first consider the objections that have been made to its doing so, either on the ground that it is not competent to interpret the provisions of the Charter, or on the ground of the alleged political character of the question.

So far as concerns its competence, the Court will simply recall that, in a previous Opinion which dealt with the interpretation of Article 4, paragraph 1, it declared that, according to Article 96 of the Charter and Article 65 of the Statute, it may give an Opinion on any legal question and that there is no provision which prohibits it from exercising, in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function falling within the normal exercise of its judicial powers (I. C. J. Reports 1947–1948, p. 61).*

With regard to the second objection, the Court notes that the General Assembly has requested it to give the legal interpretation of paragraph 2 of Article 4. As the Court stated in the same Opinion, it “cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision.”

Consequently, the Court, in accordance with its previous declarations, considers that it is competent on the basis of Articles 96 of the Charter and 65 of its Statute and that there is no reason why it should not answer the question submitted to it.

.

The Request for an Opinion envisages solely the case in which the Security Council, having voted upon a recommendation, has concluded from its vote that the recommendation was not adopted because it failed to obtain the

* This JOURNAL, Vol. 42 (1948), p. 927.

requisite majority or because of the negative vote of a permanent Member. Thus the Request refers to the case in which the General Assembly is confronted with the absence of a recommendation from the Security Council.

It is not the object of the Request to determine how the Security Council should apply the rules governing its voting procedure in regard to admissions or, in particular, that the Court should examine whether the negative vote of a permanent Member is effective to defeat a recommendation which has obtained seven or more votes. The question, as it is formulated, assumes in such a case the non-existence of a recommendation.

The Court is, therefore, called upon to determine solely whether the General Assembly can make a decision to admit a State when the Security Council has transmitted no recommendation to it.

Article 4, paragraph 2, is as follows:

"The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."

The Court has no doubt as to the meaning of this text. It requires two things to effect admission: a "recommendation" of the Security Council and a "decision" of the General Assembly. It is in the nature of things that the recommendation should come before the decision. The word "recommendation," and the word "upon" preceding it, imply the idea that the recommendation is the foundation of the decision to admit, and that the latter rests upon the recommendation. Both these acts are indispensable to form the judgment of the Organization to which the previous paragraph of Article 4 refers. The text under consideration means that the General Assembly can only decide to admit upon the recommendation of the Security Council; it determines the respective roles of the two organs whose combined action is required before admission can be effected: in other words, the recommendation of the Security Council is the condition precedent to the decision of the Assembly by which the admission is effected.

In one of the written statements placed before the Court, an attempt was made to attribute to paragraph 2 of Article 4 a different meaning. The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words. As the Permanent Court said in the case concerning the *Polish Postal Service in Danzig* (P.C.I.J., Series B, No. 11, p. 39):

"It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd."

When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning. In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them. Some of the written statements submitted to the Court have invited it to investigate the *travaux préparatoires* of the Charter. Having regard, however, to the considerations above stated, the Court is of the opinion that it is not permissible, in this case, to resort to *travaux préparatoires*.

The conclusions to which the Court is led by the text of Article 4, paragraph 2, are fully confirmed by the structure of the Charter, and particularly by the relations established by it between the General Assembly and the Security Council.

The General Assembly and the Security Council are both principal organs of the United Nations. The Charter does not place the Security Council in a subordinate position. Article 24 confers upon it "primary responsibility for the maintenance of international peace and security," and the Charter grants it for this purpose certain powers of decision. Under Articles 4, 5, and 6, the Security Council coöperates with the General Assembly in matters of admission to membership, of suspension from the exercise of the rights and privileges of membership, and of expulsion from the Organization. It has power, without the concurrence of the General Assembly, to reinstate the Member which was the object of the suspension, in its rights and privileges.

The organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of a recommendation of the Security Council. In particular, the Rules of Procedure of the General Assembly provide for consideration of the merits of an application and of the decision to be made upon it only "if the Security Council recommends the applicant State for membership" (Article 125). The Rules merely state that if the Security Council has not recommended the admission, the General Assembly may send back the application to the Security Council for further consideration (Article 126). This last step has been taken several times: it was taken in Resolution 296 (IV), the very one that embodies this Request for an Opinion.

To hold that the General Assembly has power to admit a State to membership in the absence of a recommendation of the Security Council would be to deprive the Security Council of an important power which has been entrusted to it by the Charter. It would almost nullify the role of the Se-

curity Council in the exercise of one of the essential functions of the Organization. It would mean that the Security Council would have merely to study the case, present a report, give advice, and express an opinion. This is not what Article 4, paragraph 2, says.

The Court cannot accept the suggestion made in one of the written statements submitted to the Court, that the General Assembly, in order to try to meet the requirement of Article 4, paragraph 2, could treat the absence of a recommendation as equivalent to what is described in that statement as an "unfavourable recommendation," upon which the General Assembly could base a decision to admit a State to membership.

Reference has also been made to a document of the San Francisco Conference, in order to put the possible case of an unfavourable recommendation being voted by the Security Council: such a recommendation has never been made in practice. In the opinion of the Court, Article 4, paragraph 2, envisages a favourable recommendation of the Security Council and that only. An unfavourable recommendation would not correspond to the provisions of Article 4, paragraph 2.

While keeping within the limits of a Request which deals with the scope of the powers of the General Assembly, it is enough for the Court to say that nowhere has the General Assembly received the power to change, to the point of reversing, the meaning of a vote of the Security Council.

In consequence, it is impossible to admit that the General Assembly has the power to attribute to a vote of the Security Council the character of a recommendation when the Council itself considers that no such recommendation has been made.

For these reasons,

THE COURT,

by twelve votes to two,*

is of opinion that the admission of a State to membership in the United Nations, pursuant to paragraph 2 of Article 4 of the Charter, cannot be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission, by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend.

Diplomatic immunity—Foreign Office official employed by United Nations

UNITED STATES *v.* COPLON AND GUBITCHEV. 88 F. Supp. 915.**

U. S. Dist. Ct., S. D. N. Y., Jan. 9, 1950. Ryan, D. J.

Gubitchev, a Soviet national employed as a member of the Headquarters Planning Office of the United Nations Secretariat, was indicted for vio-

* Judges Alvarez and Azevedo dissented.

** Ms. opinion supplied by Mr. Albert F. Bender, Jr., of New York.

lations of the United States espionage laws. His motion to dismiss on the ground of diplomatic immunity was rejected by Rifkind, D. J., 84 F. Supp. 472 (S. D. N. Y., May 10, 1949), this JOURNAL, Vol. 43 (1949), p. 810. After Gubitchev retained counsel of his own choice re-argument was granted, and the motion to dismiss the indictment again dismissed.

In the re-argument a member of the Soviet Embassy appeared and submitted a communication to the court from the Soviet Ambassador, as follows:

I hereby have the honor to draw your attention to the fact that the Soviet citizen, Valentin A. Gubitchev, is an officer of the diplomatic service in the Ministry of Foreign Affairs of the USSR since April 26, 1946, with the diplomatic rank of Third Secretary.

In this capacity, Mr. Gubitchev V.A. was sent, with the permission of the Government of the Union of Soviet Socialist Republics, to the USA to work in the Secretariat of the United Nations Organization.

Mr. Gubitchev V.A. arrived in the USA in July, 1946, having the Soviet Diplomatic Passport No. 12032 and the Diplomatic Visa No. 202 issued by the USA Embassy in Moscow on June 24, 1946.

The Soviet Government has not revoked the diplomatic status of Mr. Gubitchev V.A. and up to the present time he remains an officer of the Ministry of Foreign Affairs of the USSR, with the diplomatic rank of Third Secretary.

With respect to this communication, the court said:

Although the presentation of such a communication from a foreign ambassador to a judge in a pending criminal trial appears to be without precedent, I received it as a courtesy and forwarded it to the Secretary of State.

The court found that Gubitchev held the rank of Third Secretary in the Soviet Ministry of Foreign Affairs, held a diplomatic passport, had been granted an American diplomatic visa, and had served in the United States as a member of the United Nations staff and not as a member of the Soviet Embassy in Washington. His name had not been submitted by the Secretary General for possible inclusion in the "list of members of Delegations to the United Nations who are entitled to diplomatic privileges and immunities under the terms of the Headquarters Agreement." In an exchange of diplomatic correspondence between the Soviet Embassy and the Department of State, the latter rejected the claim of diplomatic immunity. Denying immunity, the court said:

The charges against this defendant are serious; his allegedly unlawful activities, it is charged, were directed against the Government of the United States and were liable to endanger its security as well as its peace with other nations. The Department of State has in the past had occasion to remind foreign governments that even if they have the right to interpose the defense of diplomatic immunity, they should not, under international law, so interfere with

the course of justice or permit such privileges, if they exist, to shield from just punishment a perpetrator of crimes such as the ones here charged. (Cf., *Matter of Wolf Von Igel*, attached to the German Embassy, 1916 For. Rel. Supp. 808-815.)

Counsel for Gubitchev concedes that (1) he is not a diplomatic officer of the Union of Soviet Socialist Republics attached to the Soviet Embassy in this country, and (2) the defendant was neither sent to, received nor accredited by our Government.

But, it is urged on this motion that Gubitchev, a diplomatic officer of the USSR, came to this country to accept a position with the Secretariat of the United Nations, in possession of a diplomatic passport issued by the Ministry of Foreign Affairs of the USSR and a diplomatic visa issued by the United States Embassy in Moscow, and that, therefore, under the Law of Nations, he is entitled to be received in this country in a diplomatic status with all the privileges and immunities of a diplomat—including immunity from prosecution on the indictment herein.

.

Gubitchev did not enter the United States as an emissary from the USSR to the United States; he was never received as such; he was never attached to the Soviet Embassy; he was never notified to the United States as attached to such Embassy and never acted in a diplomatic capacity in the United States.

.

On the foregoing facts, the court concludes that the defendant's motion must be denied. The claim of immunity is grounded solely on the facts that Gubitchev is a diplomatic officer of the USSR, that he was, in this capacity, sent by his government to the United Nations and that he was in possession of a diplomatic passport and diplomatic visa at the time of his arrest.

It has long been recognized that the United States will not afford diplomatic immunity unless the person claiming it not only has diplomatic status, but is also in an "intimate association with the work of a permanent diplomatic mission." 2 *Hyde on International Law* Sec. 416A. The Department of State has had occasion to declare that "under customary international law, diplomatic privileges and immunities are only conferred upon a well-defined class of persons, namely, those who are sent by one state to another on *diplomatic missions*." (The Under Secretary of State to the Turkish Ambassador, Oct. 16, 1933, MS Dept. of State, file 701.09/374, 4 *Hackworth, Digest of International Law*, p. 422.)

This principle has been recognized by the courts of other countries. The courts of England have ruled that in order to establish the protection afforded by diplomatic immunity the evidence must establish actual service as a diplomat by the one claiming the right. *Crosse v. Tabbot*, 8 Mod. Rep. 288 (1724); *Widmore v. Alvarez*, 2 Stra. 797 (1731); 6 *Halsbury's Laws of England* 512; 30 *Halsbury's Laws of England* 129.

In the instant case, the defendant has never asserted that he came to this country on a diplomatic mission and I have found as a fact

that he never acted in a diplomatic character in the United States.

The visa which was affixed to the defendant's passport did not of itself constitute a grant of diplomatic immunity for all of his activities in this country. It is provided in the Code of Federal Regulations, Section 40.4(a), that such diplomatic visas may be granted to fifteen different categories of individuals. Many of these categories embrace individuals who, it has been universally recognized, do not have diplomatic status or immunity. That diplomatic visas are on occasion granted by the Government of the United States as a matter of courtesy and do not thereby constitute a recognition of diplomatic status has been its proclaimed policy and is set forth in its duly promulgated and publicly published regulations.

Furthermore, we have in this case the certification by the Department of State that the defendant does not enjoy diplomatic status, which, as Judge Rifkind held, is "the dispositive fact." 84 F. Supp. at 475, citing cases.

Diplomatic status is a political question and a matter of state; the finding of the Secretary of State must be accepted unquestioned. The courts of the United States are not alone in applying this rule. "Thus in Great Britain [*Engelke v. Musmann*, 1928, A.C. 433, 435)], in the United States (*United States v. Liddle*, 1808, Fed. Cas. No. 15,598; *United States v. Benner*, 1830, 1 Baldw. 234; *In re Baiz*, (1890), 135 U. S. 403) and apparently in France (*Drtilék c. Barbier* (1925), Cour d'appel de Paris, 53 Journal de droit international privé (1926), 638), the decision of the executive department as to whether a person is a member of a foreign mission or of its personnel is conclusive upon the courts." *Research in International Law*, Harvard Law School, 1932, p. 76.

There is no reason in principle why the determination of the Secretary of State in this case should not be afforded equal weight with a similar determination of the diplomatic status in the case of public ministers or ambassadors sent to represent foreign governments in this country. The latter certifications have universally been held to be conclusive upon the courts. 42 Harv. L. Rev. 582. And I feel that the certification in this case is equally conclusive.

Gubitchev was not a member of the permanent Soviet mission, nor was he included in any special Soviet mission to the United States. He did not acquire diplomatic immunity from prosecution on the instant indictment by his employment in the United Nations. He may not claim diplomatic status alleging that he was on a mission of a non-diplomatic nature. The Soviet Union itself has recognized that its personnel on missions of a non-diplomatic character may acquire diplomatic privileges and immunities only by express treaty provisions and attachment to a permanent diplomatic mission. (See, Commercial Treaty between Germany and the USSR, signed October 12, 1945 (53 L.N.T.S. No. 1257, p. 7); the USSR with Italy, February 7, 1924 (1 Raccolta Ufficiale della Leggi e dei Decreti del Regno d'Italia (1924), No. 342, Art. 3). Gubitchev's journey here and his subsequent sojourn in this country was not embraced in an agreement or treaty of such a nature, nor was he at any time regarded as attached to the permanent Soviet mission.

Where "a person is sent by a foreign government as a special diplomatic representative for a temporary purpose, without being

authorized or received by the Sovereign as an ambassador or public minister, recourse must be had to the terms of the special agreement governing his mission and the extent of diplomatic privilege determined therefrom as a question of fact." 6 *Halsbury's Laws of England*, 509. The possible immunities that the defendant might enjoy under the terms of the various agreements between this country and the United Nations were discussed at length by Judge Rifkind. He concluded (and with him I agree, and indeed the defendant now concedes) that the defendant received no immunity which would prevent his prosecution on the instant indictment from those agreements.

Treaties—effect of U.N. Charter as national law—alien land laws held invalid

SEI FUJII v. STATE OF CALIFORNIA. 96 Cong. Rec., Apr. 28, 1950; Sen. Proc., 6072.

✓ California Dist. Ct. App., 2nd Dist., April 24, 1950. Wilson, J.

The alien land law of California, which forbids aliens ineligible to citizenship to "acquire, possess, enjoy, use, cultivate, occupy, and transfer real property, or any interest therein," was held invalid as in conflict with the Charter of the United Nations, although it had been previously upheld as against charges of unconstitutionality by the Supreme Courts of the United States and of the State of California.

The court took judicial notice of the 1940 census figures and of the "congressional erosion" of the prohibitions in the nationality laws of the United States, in determining that practically the only alien group of any size within this country who remain ineligible and thus fall within the statute are the Japanese, one of whom had brought this action. The court rested its decision entirely upon the Charter, with passing reference to the Declaration of Human Rights as expounding the views of the parties to the Charter:

The Charter has become "the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." (United States Constitution, art. VI, sec. 2.) The position of this country in the family of nations forbids trafficking in innocuous generalities, but demands that every State in the Union accept and act upon the Charter according to its plain language and its unmistakable purpose and intent.

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A perusal of the Charter renders it manifest that restrictions contained in the alien land law are in direct conflict with the plain terms of the Charter . . . [referring to the Preamble, and to articles 1, 2, and 55] . . . and with the purposes announced therein by its framers. It is incompatible with article 17 of the Declaration of Human Rights which proclaims the right of everyone to own property. We have shown that the expansion by the Congress of the classes of nationals

eligible to citizenship has correspondingly shrunk the group ineligible under the provisions of the alien land law to own or lease land in California until the latter now consists in reality of a very small number of Japanese. The other Asiatics who still remain on the proscribed list are so few that they need not be considered.

Clearly such a discrimination against a people of one race is contrary both to the letter and to the spirit of the Charter which, as a treaty, is paramount to every law of every State in conflict with it. The alien land law must therefore yield to the treaty as the superior authority. The restrictions of the statute based on eligibility to citizenship, but which ultimately and actually are referable to race or color, must be and are therefore declared untenable and unenforceable.

Note: Respondent's petition for rehearing was denied on May 22, 1950. On June 2, 1950, an appeal was filed in the Supreme Court of California (2nd Civil No. 17309).

Non-recognition—effect of Soviet consul's acts on behalf of Latvia

IN RE ADLER'S ESTATE. 93 N. Y. S. (2d) 416.

New York, Surr. Ct., Kings County, Dec. 22, 1949. McGarey, Surr.

Under a New York statute requiring that powers of attorney executed in a foreign country be certified by "a consular officer of such foreign country" as in conformity with the laws thereof, the court rejected as inadequate powers of attorney executed in Latvia and certified by a U.S.S.R. consul in New York to be in conformity with the laws of the U.S.S.R. The court said:

The certificates of the Secretary of State disclose that the United States does not recognize the Soviet regime in Latvia, nor the incorporation of that country into the Union of Soviet Socialist Republics, nor the legality of any of the acts or decrees of that regime.

Citing *Latvian State Cargo & Passenger S/S Line v. Clark*, 80 F. Supp. 683, this JOURNAL, Vol. 43 (1949), p. 380, it added:

If, therefore, the court may not give effect to an act of an unrecognized government, it may not give effect to an act of an official acting in behalf of that regime.*

Treaties—effect as municipal law

THE REPUBLIC OF ITALY v. HAMBROS BANK. [1950] 1 All Eng. L. R. 430.

England, Chancery Div., Feb. 9, 1950. Vaisey, J.

* In *In re Uri's Estate*, 71 Atl. (2d) 665 (Feb. 14, 1950), the Somerset County Court of New Jersey directed an executor to deposit in court, rather than to pay, a bequest to a Hungarian orphanage formerly controlled by the Catholic Church and now, "upon information obtained from the Department of State," nationalized and removed from Church control, relying (despite the protests of the Hungarian consular officer acting on behalf of the orphanage) on Ch. 148 of the New Jersey Laws of 1940, which provides for such deposit when it appears that the beneficiary "would not have the benefit or use or control of the money or other property due him."

Plaintiff Republic of Italy sought a declaration that by reason of the Financial Agreement of April 17, 1947, between the United Kingdom and Italy (with respect to the status of Italian property in the United Kingdom under the Treaty of Peace with Italy), the property in England of the late King of Italy was held by the Custodian of Enemy Property subject to a fiduciary obligation under the Agreement, and that transfer of property by the Custodian to defendant bank, as administrator for the King's estate, was unlawful. In giving judgment for the defendants, the court held the Agreement was a treaty, and as such not cognizable or justiciable by the court, nor did it confer rights on Italy enforceable by the court.

Immunity of foreign government property—government possession required

DOLLEUS MIEG ET CIE. S. A. v. BANK OF ENGLAND. [1950] 1 All Eng. L. R. 747.

England, Court of Appeal, March 6, 1950. Evershed, M. R., Somervell and Cohen, L. JJ.

The court reversed the decision of the Chancery Division, [1949] 1 All Eng. L. R. 946, this JOURNAL, Vol. 44 (1950), p. 204, that the Bank of England was immune to suit as bailee of certain gold bars deposited with it by the Tripartite Gold Commission and alleged to have been seized from plaintiff French company by the Germans and later recovered by American armed forces. After the judgment below, it was ascertained that, although the bars were deposited under an agreement that they be kept separate and identifiable, they had not in fact been kept separate but had been treated as a specified number of ounces of gold; part, indeed, of the originally deposited bars had been inadvertently sold by the Bank. The court held that in view of these facts the bars could not be treated as property in the possession or under the control of the three governments (United States, France, United Kingdom) constituting the Commission. The action not having been brought against a foreign government, sovereign immunity could not be claimed unless the property concerned were in the possession or control of the foreign government, citing *The Cristina*, [1938] A. C. 485.¹ The judges also expressed the opinion that immunity should not be given a foreign country unless, in similar circumstances, that foreign country affords immunity; this was particularly applicable in the case of the United States, where possession by the sovereign has been held a prerequisite for immunity, in *Long v. The Tampico*, 16 Fed. 491 (1883); *The Navemar*, 303 U. S. 68 (1938).²

¹ This JOURNAL, Vol. 32 (1938), p. 824.

² *Ibid.*, p. 381.

NATIONALITY CASES IN UNITED STATES COURTS

Where an American-born child was taken to Rumania in 1921 at the age of 9, was denied an American passport in 1931 and 1934 because of erroneous rulings that he had lost his citizenship by his father's registration as a Rumanian, was inducted into the Rumanian Army in 1936 and took an oath of allegiance to Rumania as an incident of induction, the Court of Appeals for the Second Circuit held that no expatriation had taken place. *Podea v. Acheson*, 179 F. (2d) 306 (Jan. 10, 1950), reversing 83 F. Supp. 216, this JOURNAL, Vol. 43 (1949), p. 808. A. Hand, Ct.J., said:

It seems most technical to hold that the plaintiff did not act under duress. In our opinion he never voluntarily expatriated himself by taking an oath of allegiance to Rumania or by serving in the Rumanian army. Both steps were required by the situation in which he found himself, were primarily caused by the erroneous advice of the State Department and were farthest from his real purpose.

In *Miranda v. Clark*, 180 F. (2d) 257 (Ct. App., 9th, Feb. 15, 1950), it was held that a person born of Mexican parents in the United States, who had resided in Mexico since he was five, expatriated himself by voting in a local primary election for mayor in Mexico when he was twenty, the court pointing out that 8 U. S. C. § 803(b) permitted voluntary expatriation by minors over eighteen. Voting in a Hungarian election expatriated a native-born American who had lived many years in Hungary with a Hungarian husband, *Kazdy-Reich v. Marshall*, 88 F. Supp. 787 (Dist. Col., Jan. 9, 1950). A child born in the United States of Italian parents in 1916 and taken to Italy by them in 1922, was held to have expatriated himself by taking an oath of allegiance to Italy shortly before his majority, serving in the Italian army, and voting in an Italian election in 1946, despite his contention that these acts could not be deemed voluntary, since he alleged that he did not know that he had American citizenship by birth, *Cantoni v. Acheson*, 88 F. Supp. 576 (N. D. Calif., Feb. 2, 1950).

In *Perez v. McGrath*, 18 Law Week 2243 (N. D. Calif., Oct. 27, 1949), it was held that an American citizen minor who went with his parents to Mexico during the war to avoid the draft and remained there for that purpose until after coming of age and the cessation of hostilities, was expatriated despite his subsequent return to the United States, under the Act of 1944, 8 U. S. C. § 801(j), providing for expatriation of anyone "departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

In *Kristensen v. McGrath*, 179 F. (2d) 796 (Ct. App., Dist. Col., Dec. 19, 1949), a Dane who came to the United States in August, 1939, on a 60-day visitor's visa, who was ordered deported in 1941 for taking a job while on an extension of that visa, whose deportation was stayed because of travel difficulties during the war, and who in March, 1942, filed a Selective Service form claiming exemption as an alien, was held not to have become "ineligible to naturalization" by reason of § 3(a) of the Selective Service Act, 50 U. S. C. App. § 303(a). That Act subjected every male person "residing in the United States" to liability for service, provided relief for neutral persons upon their application, and added that "any person who makes such application shall thereafter be debarred from becoming a citizen." The court held that while in the country on a visitor's visa and awaiting deportation, he was not "residing" in the United States and hence not subject to the Act; consequently there was no need to pass on his contention that in March, 1942, Denmark was not "neutral" (being under German occupation), although the Selective Service Board had classified Denmark as neutral just before his application was filed.

A native-born German, resident in the United States since 1911 and long identified with American schools and business as a chemist, against whom adverse witnesses could only testify to isolated and detached statements by him criticizing public men and measures, was held "attached to the principles of the Constitution" as required for naturalization, In *re Kullman*, 87 F. Supp. 1001 (W. D. Mo., Dec. 31, 1949). Applicant was held "of good moral character" despite the fact that his first wife had obtained an uncontested divorce for cruelty, and that he had lived with his second wife a short time before their ultimate marriage, *Application of Murra*, 178 F. (2d) 670 (Ct. App., 7th, Dec. 14, 1949). Defendant's naturalization was canceled when it was shown that prior to naturalization she had had sexual relations with a married man in the five years prior to naturalization, despite her contention that "she did not feel that her own actions were immoral at the time of the conduct complained of, because of her deep infatuation with the married man," *United States v. Cloutier*, 87 F. Supp. 848 (E. D. Mich., Nov. 4, 1949). For other denaturalization cases, see *Ackermann v. United States*, 178 F. (2d) 983 (Ct. App. 5th, Dec. 29, 1949), *United States v. Eichenlaub*, 180 F. (2d) 314 (Ct. App. 2d, Feb. 3, 1950). Holding that one released on bail pending deportation could not apply for naturalization, see *Knauff v. Shaughnessy*, 88 F. Supp. 607 (S. D. N. Y., June 28, 1949), *affd.* 179 F. (2d) 628 (Ct. App. 2d, Jan. 25, 1950). On relationship of 1907 and 1940 Nationality Acts, see *Bertoldi v. McGrath*, 178 F. (2d) 977 (Ct. App. Dist. Col., Dec. 5, 1949). Construing § 316 of the 1940 Nationality Act, 8 U. S. C. § 716, regarding naturalization of adopted children, the court held that naturalization could not take place until two years

after the adoption in the United States, regardless of a prior adoption abroad, *In re Seeley*, 87 F. Supp. 638 (D. Mass., Oct. 24, 1949).

Reversing a decision rejecting a patent application, the Court of Customs and Patent Appeals held in *Application of Meyer*, 178 F. (2d) 931 (Dec. 12, 1949), that a German Jewish person lost German nationality as a result of the German decree of Nov. 14, 1935, and therefore was not a German at the time of his invention in 1938-39; as he had acquired British nationality prior to his application under the Boykin Act of 1946, he was entitled to the benefit of his British patent application under that Act, 35 U. S. C. §§ 101 ff., which did not extend to "citizens of any country with which the United States shall have been at war" since Sept. 8, 1939. Similarly the court looked to German law in holding that a Danish woman became a German citizen upon marrying a German in 1926, and thus upheld a German divorce obtained while both spouses were residing in the United States under immigration visas, *Oettgen v. Oettgen*, 94 N. Y. S (2d) 168 (Spec. Term, N. Y. County, Nov. 17, 1949).

BOOK REVIEWS AND NOTES

La Puissance Protectrice en Droit International. By Antonino Janner. Translated from the German by P. Monney. (Juristische Fakultät der Universität Basel, Schriftenreihe, Heft 7.) Basel: Verlag von Helbing & Lichtenhahn, 1948. pp. 79. Annexes.

During World War II Dr. Janner, who has the rank of *Secrétaire de Légation*, occupied a responsible position in the Division of Foreign Interests of the Swiss Federal Political Department. He is thus peculiarly well qualified by training and experience to write on the subject of the protecting Power in international law. As indicated in a subtitle to his study, he has limited his examination to the experience of Switzerland as a protecting Power in the second World War. The Swiss experience in this field was so vast, however (involving the protection of the foreign interests of some thirty-five belligerent countries), that Dr. Janner's monograph, although limited in scope, makes a significant contribution to our understanding of the theory and practice of third-party protection of foreign interests in time of war.

The study is divided into five chapters dealing with the following aspects of the problem: (1) the situations which lead to a request for the services of a protecting Power; (2) the relationships between the protecting Power, the protected Power, and the local Power; (3) the scope and termination of the protecting Power's activities; (4) the special duties of the protecting Power in time of war; and (5) the organizational problems confronted by the Swiss Foreign Office in protecting belligerent interests on a wholesale scale in the midst of total war. The Annexes include a list of the Powers protected by Switzerland in World War II, a copy of the *Fragebogen* used in visiting camps where German prisoners of war were held, and a copy of the questionnaire (in English) for "Camp Inspections in the Far East." Although the study is primarily concerned with clarifying the position of the protecting Power in its legal aspects, the author also emphasizes the political considerations which a protecting Power, particularly one in the position of Switzerland, must constantly bear in mind lest it be caught in the cross-fire of powerful belligerents.

Since so little has been written on this unique aspect of diplomatic and consular practice, it is unfortunate (as Dr. Janner points out in a special footnote to his Introduction) that his study had already been printed before he received a copy of the only other recent and more extensive analysis of the subject, namely, the volume published in 1947 by the Department of State, entitled *Protection of Foreign Interests* (reviewed in this JOURNAL,

Vol. 41 (1947), p. 971). If the timing of these two publications had been otherwise, Dr. Janner might have been able to expand his study by illuminating references to the similarities in American and Swiss practice in this activity during the recent war. He notes with pleasure, however, that the conclusions expressed in the Department's volume agree with his own at all important points, and he expresses the hope (which seems to be justified) that this evolving *unité de doctrine* on an international scale will improve and clarify the position of the protecting Power in peace as well as in war.

WILLIAM M. FRANKLIN

La Cambiale nel Diritto Internazionale Privato. By Gaetano Arangio-Ruiz. Milan: A. Giuffrè, 1946. pp. 318. L. 440.

This work is a systematic and comprehensive commentary on the Italian rules of conflict of laws regarding negotiable instruments. Two different sets of rules of conflict are applicable to negotiable instruments in Italy: those contained in the Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes, signed at Geneva on June 7, 1930 (to which Italy is a party), which apply to the situations and transactions covered by said Convention, and the rules applicable to cases not covered by the Convention which are set forth in the Provisions on the Law in General preceding the Italian Civil Code of 1942. The latter are of special interest for American practitioners, since the United States is not a party to the Geneva Convention of 1930. Due to the fact that the same negotiable instrument may be governed as to certain aspects and situations by the first set of rules, and as to others by the second, and that, furthermore, each set of rules provides for different rules of conflict with regard to particular situations or transactions, the whole picture is one of the most complicated in the field of the conflict of laws. Mr. Arangio-Ruiz, the worthy son of one of the most distinguished Italian jurists, is able to find his way through this maze of technical rules and to analyze and present the whole subject-matter in a clear and orderly manner.

Proceeding on the premise that the various transactions relating to the same negotiable instrument are independent from the viewpoint of the applicable rule of conflicts, he first considers the problems of characterization (qualification) which may arise with regard to bills and notes, and then sets forth the different rules of conflicts applicable to the capacity of the parties to a negotiable instrument and to its form and substance. With regard to various obligations created through a negotiable instrument the author sets forth the Italian rules of conflicts which designate the law governing the duties of the drawer and of the payee, of the endorser, of the accommodation signatory, and of the acceptor. He also analyzes the various rules of conflicts applicable to the various transactions underlying negotiable instruments.

Although the book is on a somewhat theoretical level, it also offers practical solutions for the various problems considered and gives attention to some of the decisions of the Italian courts related to the subject-matter. This excellent work is of interest not only to the student of the Italian rules of conflicts but to all those who are interested in the interpretation and application of the Geneva Convention of 1930.

ANGELO PIERO SERENI

The Department of State: A History of Its Organization, Procedure, and Personnel. By Graham H. Stuart. New York: Macmillan Co., 1949. pp. x, 518. Illustrations. Index. \$7.50.

This volume is a companion to the author's *American Diplomatic and Consular Practice*, published in 1936 and reviewed in this JOURNAL (Vol. 30, July, 1936, p. 567). It is, however, less an institutional study of the Department of State than the history of its Secretaries, their personalities, policies, associates, and administrative methods. The reader does, however, become aware of the steps integrating the Department from the many conflicting and overlapping committees of the Congress under the Articles of Confederation to the present closely-knit organization; from the diminutive Department of Foreign Affairs established in 1781 to the present Department of State with a staff of 6,000 persons.

The materials for an institutional history are presented. The book makes easily available the data on the various reorganizations of the Department, the principal officials under the Secretary, and the changes in the governing law, the functions of the Department, and the number and organization of the staff.

The author pays little attention to the rôle of the Department as an institution of international law. The latter term does not appear in the index. The implications which might be drawn from the suggestion of the Permanent Court of International Justice in the East Greenland Case that foreign ministers are agents of international law whose utterances are presumed to bind the state might have been developed. The author's point of view is political and historical rather than legal.

The book will be useful to students of American history, of public administration, and of American foreign policy. While foreign policy is not its primary emphasis, new light is thrown on a number of transactions because of the author's clear understanding of the way in which policy was made at the time, his knowledge of the personalities involved, and his opportunity to study the Department's archives.

The organization of the book is chronological. Each chapter deals with the administration of one or more Secretaries. The author does not hesitate on occasion to criticize methods and policies and to make it clear who,

in his judgment, were good or not-so-good Secretaries. He pays tribute to the outstanding abilities of John Quincy Adams, Daniel Webster, William H. Seward, Elihu Root, Charles Evans Hughes, Henry L. Stimson, and Cordell Hull. Of the latter he says: "He was a great Secretary of State, a great statesman, but above all, a great man" (p. 397). While recognizing the brilliance of Henry Clay, the ability and wit of John Hay, and the originality and energy of James G. Blaine, he attaches some qualifications to his admiration in each of these cases. Each of these able Secretaries accomplished much, but in the case of Clay and Blaine, they suffered from circumstances, and John Hay suffered from his antipathy to the requirements of practical politics. He says of Frederick T. Frelinghuysen: "His policy as Secretary of State consisted for the most part in reversing the policies of Secretary Blaine. His instructions to the able diplomat, William H. Trescott, regarding the war of the Pacific were almost incoherent in their apparent contradictions. . . . He was not a great Secretary of State, but rather a Christian gentleman" (pp. 162-163).

Stuart recognizes the very great difference on different occasions in the relationship between the Secretary of State and the President. Concerning President Grant's tendency to make diplomatic appointments without consulting his Secretary of State, Hamilton Fish, he writes, after recounting the circumstances of Motley's recall and Schenck's resignation in disgrace from the Legation in London: "When we add to these the irascible Sickles in Madrid, the irresponsible Jones in Belgium, the garrulous Jay in Vienna, the obstreperous Charles Washburn in Paraguay, and the violent paranoiac Rumsey Wing in Ecuador, it is easy to understand that Fish finally revolted against President Grant's appointments to positions for which the Department of State was responsible" (pp. 149-150).

The Department was small until the 20th century, but after the Spanish-American War it grew rapidly in personnel, and the problems of organization and administration became increasingly difficult. The volume devotes over half of its pages to this later period and a quarter of its pages to the administration of Secretary Hull and his successors. Due attention is given in this period to the repeated reorganizations of the Department of State and the relations of the Foreign Service and the Department, ending with a brief note about the Hoover Commission's plan of reorganization. "In a world of ruthless power politics," writes Mr. Stuart on the final page, "it is vital that the Department of State be made an efficient and responsible agency capable of formulating and carrying out a foreign policy which will maintain, strengthen, and improve the status of the United States in world affairs." The volume is an important contribution to public understanding of the problems to be solved in meeting this need.

QUINCY WRIGHT

A Charter for World Trade. By Clair Wilcox. New York: Macmillan Co., 1949. pp. xvii, 333. Index. \$4.50.

This volume merits the favorable attention not only of specialists in the field of international economic affairs but of students of international relations in general. Its author, who was formerly Director of the State Department's Office of International Trade Policy, had a central part in the diplomacy which attended the evolution of the Charter for an International Trade Organization. In this book he expounds with clarity and conciseness the plan of the Charter and appraises it from the point of view of economic foreign policy.

Complicated questions such as those related to quantitative restrictions on imports, preferences, cartels, international commodity agreements, subsidies, restrictive business practices, exceptions, and "escape" clauses receive effective treatment. The chapters on "Industrial Stability and World Trade" and "Economic Development and International Investment" deal instructively with broad problems closely connected with provisions looking to the expansion of world trade. Perhaps least impressive of the chapters is the one on "State Trading," in which the author admits the difficulties in finding a solution (p. 97), despite sound principles incorporated in the Charter in the attempt to "fit state trading into the pattern of multilateralism and non-discrimination" (p. 205).

Specialists in international law will doubtless find of particular interest what is said concerning the Charter's utility as an instrument under which law may be developed, the effect of Charter provisions upon the most-favored-nation principle, and the extent to which the plan makes use of the International Court of Justice. As to the first of these, Professor Wilcox makes clear that, while none of the participating nations is willing to surrender sovereignty (p. 204), the provisions represent significant moves in international coöperation. Thus, the chapter of the Charter which deals with restrictive business practices is seen as marking "the first approach toward international agreement in this field" and as laying the foundation for a "structure of international common law to govern business practices in foreign trade" (pp. 112, 113). The provisions as a whole, the author believes, will make possible the building up, case by case, of a body of accepted principles. As its influence increases the Charter "will bring the national policies that govern trade into conformity with the general rules of international law" (p. 209).

The possibility that some, but not all, commercially important states will accept the Charter makes it necessary to look at the manner in which it will affect trade between members and non-members. Professor Wilcox considers, among other things, the effect upon most-favored-nation commitments between a member and a non-member. He points out that the pertinent article in the Havana draft neither forbids the extension to non-

members of tariff concessions and Charter benefits nor requires abrogation of agreements under which such extension is guaranteed, although it permits members to deny equality of treatment to non-members. It forbids members to enter into certain types of agreements with non-members (pp. 163-164).

For the settlement of disputes the Charter provides several different methods. They include direct consultation between disputants, arbitration agreed to by the parties, reference to the Executive Board of the ITO, and reference to the Conference of the ITO. On legal (not economic or financial) questions the ITO may, and, if any member so requests, it must, seek an advisory opinion from the International Court of Justice. Such advisory opinions become binding upon the Organization. "A basis is thus provided," Professor Wilcox concludes, "for the development of a body of international law to govern trade relationships" (p. 160). His earlier statement (p. 148) that there is provided in the Charter "for the first time, the right to bring before an international tribunal cases involving treatment of American investments abroad," unless intended to be confined to multilateral arrangements, would seem to overlook the compromissary clause (Article 28) of the Sino-American commercial treaty signed November 4, 1946.

The value of this authoritative book on an instrument of great potential importance is increased by the inclusion of a reader's guide to the Havana Charter, a text of the Charter itself, and an index.

ROBERT R. WILSON

Public Opinion and Foreign Policy. By Lester Markel and others. New York: Harper & Bros., 1949. pp. xii, 228. \$3.50.

The art of making friends and influencing nations is as old as history. What is new is the rapid development of mass media of communication and the related importance of mass opinion. Although propaganda as an instrument of foreign policy received considerable emphasis and development during World War I, its real potential as an element in total war was first given full recognition and application by the Nazis within and outside of Germany. Today public opinion is recognized as an important factor in foreign policy and public information is an arm of the foreign office of every major nation. This book is primarily concerned with an analysis and exposition of the machinery by which, in the United States today, public opinion at home and abroad with respect to foreign policy is sought to be measured and influenced.

The various papers were prepared and published under the auspices of the Council on Foreign Relations by a study group under the chairmanship of the Sunday Editor of the *New York Times*. The group includes a distinguished list from the academic and journalistic professions, the latter

largely from the staff of the *New York Times*. This combination of talent and experience has produced a series of documents of the greatest competence and authority. More than this, the study group technique of the Council on Foreign Relations has produced a clarity and a unity of style and development too often missing from symposiums.

The reader wishing to know how the vast and complex machinery works from public opinion polls and newspaper columnists to Presidential press conferences and Voice of America broadcasts will find here an admirable and accurate summary, together with valuable criticisms and suggestions. No one today can afford to ignore the foreign relations of his nation; today, as never before, the citizen has a part in them and in their consequences. This book should contribute materially to a fuller understanding of what mass communications mean in the formulation of foreign policy and its day-by-day application and so to a fuller understanding of the foreign policy itself. It is thus a contribution to citizenship.

JOHN E. LOCKWOOD

The Foreign Policy of Soviet Russia from 1929-1941. By Max Beloff. Vol. II, 1936-1941. New York: Oxford University Press, 1949. pp. viii, 434. Index. \$5.00.

This volume continues Mr. Beloff's study of Soviet foreign policy from 1929 to 1936, reviewed in this JOURNAL, Vol. 42 (1948), p. 534. Extensive use is made of Russian and foreign sources, memoir materials, and the documentation of the Nuremberg Trials. The author, however, notes the difficulties in assessing motives, more serious in totalitarian régimes where there is no public opinion and no public debate disclosing the alternatives under consideration (p. 385). The writer, however, does not believe that the "totalitarian façade" necessarily implies agreement at every stage of policy-making, or that disagreement with the prevailing view is always synonymous with treason, but it is clear that there is no means of ascertaining "even in outline the nature of the conflicting interests and objectives whose tensions have to be resolved" (p. 388).

The text is divided into two sections dealing respectively with the breakdown of collective security from 1936 to 1939, and with the Soviet Union and the "second imperialist war," terminating with the apparently unexpected German attack upon the Soviet Union in June, 1941. The first of these sections includes chapters on Soviet policy in respect to each of the relevant areas of the world, Spain, Turkey, the Rhineland, Western Europe, the Far East, and the Middle East. The second part is treated chronologically.

Especially interesting is the concluding chapter on "The Principles of Soviet Foreign Policy." The author discusses the "Russian" and "Com-

munist" schools of thought as to basic objectives and accepts a combination of both:

The marriage between a territorial or ethnic power-complex and an ideology (divine or secular) is no new thing. If the expansion of Islam and of Arab rule offers the most striking parallel, there is perhaps a closer one in the inter-relations of the Counter-Reformation and the Habsburg dynasty. . . . It is clear that such alliances when once formed have normally proved extremely durable, and it would have been surprising if anything less than a successful counter-revolution had sufficed to put an end to the Russo-Marxist alliance of 1917" (p. 391).

Other comments deserving reflection are: "by virtue of the Marxist-Leninist ideology itself, the regime is bound to be continually threatened so long as non-Communist States exist. For between a society like that of Soviet Russia, where the proletarian revolution is in the past, and the 'capitalist' world, where this revolution is in the future, there is an unbridgeable gulf" (p. 391).

"It is necessary to realize that the conflict is one in which the outcome is a foreordained victory for the Soviet State and, with it, the international proletariat. To try to comprehend the Soviet outlook and to dismiss the inevitability of the world proletarian revolution is as idle as to try to comprehend the outlook of medieval man and to dismiss the reality of the Last Judgment" (p. 392). "What must be realized is the continued psychological advantage which the belief in inevitable victory—in working with the inexorable laws of history and not against them—has conferred upon the Communist faithful, and above all the extreme flexibility in daily action which they have derived from the conviction of their own absolute righteousness. . . . One is at grips with a dual system of morality—that what is permitted to the faithful in the service of the faith is morally reprehensible among the infidels" (p. 393).

As to policy: "Where a single powerful enemy has emerged in the capitalist environment, Soviet diplomacy has sought to isolate it, as during the 'collective security' period from 1934–38. Where the outside world is in turmoil, and the capitalist powers indulging in internecine strife, the opportunity for expansion recurs, as in 1939–41" (p. 394).

As to international law: "Even if the original formulation of the Soviet theorists—the 'international law of the transition period'—is no longer fashionable, it is difficult to see that later attempts to clarify the situation have done more than embroider the same theme" (p. 395).

As to international organization: "The gulf between the Soviet world and the non-Soviet world has never on the Soviet side been regarded as bridgeable by machinery—for such machinery must logically involve the sacrifice of sovereignty to a partially non-Socialist organ which could not but be biased against the U.S.S.R." (p. 395).

As to war, when France declined to follow up the Franco-Soviet Pact of 1935 with a military convention on the ground that France wanted peace while the Soviets seemed to regard European war "if not desirable, at least as inevitable," the Soviet Ambassador Potemkin said "Why should war frighten us? Soviet Russia emerged from the last war. Soviet Europe will emerge from the next" (p. 401).

Mr. Beloff concludes with a comment emphasized in his first volume, that while the Soviets claim that their "scientific" theory makes their decisions in foreign policy infallible, yet "for the non-Marxist, Soviet policy is as imperfect and arbitrary and non-scientific as that of any other State. The history of the revolution in China, of Hitler's rise to power in Germany, and of the course of events in Europe in 1940 and 1941, are none of them testimonies to the infallibility of the Marxist prognosis. The student of Soviet foreign policy is likely to arise from his task with a strengthened conviction that history above all is the study of the imperfect, the contingent, and the unique" (p. 395).

The author is informed as to facts and wise as to interpretation. The book should be widely read as a background to the present problems of Western relations with the Soviet Union.

QUINCY WRIGHT

Geo-Economic Regionalism and World Federation. By Maurice Parmelee. New York: Exposition Press, 1949. pp. xi, 137. Maps. Index. \$2.50.

Plans to rearrange the world are not new. This volume is an interesting contribution towards such attempts. Some ideas may sound unconventional to orthodox international lawyers, but to world federationists this book, proposing and describing an organization of geo-economic regions which, according to the inside flap of the dust cover, "are both individually viable and capable of being integrated into a practicable world federation," may be of vital interest.

In the preface the author remarks that "there can be no permanent peace so long as each nation retains its sovereignty. There can be no effective world organization to solve the economic and social problems of mankind so long as the nation is the unit of organization. The region, limiting national sovereignty and furnishing a suitable unit of organization for a world federation, is a practicable solution." It is claimed that "this book is the first attempt to delineate regions in accordance with geographic and economic principles. Unless these principles are recognized and applied in setting up a world organization, it is hopeless to expect it to prevent war." The author feels that his book is "a modest contribution to the gradual evolution of a genuine world federation which can avert war and guarantee permanent prosperity for mankind."

In an "Introductory Summary" the author states among other things that

geo-economic regionalism is not sectionalism, nationalism, continentalism, or racialism. It does not necessarily involve linguistic, ethnic or cultural homogeneity. Although it has political, administrative, and juridical aspects, it does not eliminate national states. It contemplates regions organized in accordance with the basic physiographic features—climate, soil, mineral resources, sources of natural energy, topography—and the economic factors created by mankind within the natural environment. . . . World federation based upon geo-economic regionalism is by far the most constructive proposal for the future of the world.

Four assumptions may be made as to the conditions essential for the establishment of the World Federation conceived by the author (p. 121): (1) the renunciation of absolute national sovereignty; (2) national disarmament; (3) the prevention of discriminatory economic measures; and (4) democratic institutions.

The author suggests that in this era of cold war and atomic threats geo-economic regionalism should be carefully studied and widely discussed, for which reason he has developed his plan for global peace and prosperity through a world federation organized in accordance with the geo-economic facts of life.

CHARLES KRUSZEWSKI

Power Politics. By Martin Wight. London & New York: Royal Institute of International Affairs, 1949. pp. 66. \$50.

Technology and International Relations. Edited by William Fielding Ogburn. Chicago: University of Chicago Press, 1949. pp. vii, 202. Index. \$4.00.

The two volumes under review represent attempts to explore the fundamentals of international politics, to discover whether there be deterministic elements which operate in the field of interstate relations.

Martin Wight's *Power Politics* has been reprinted to meet the demand for a small monograph which at the same time gives a lucid account of the basic problems of the politics of the Powers. Wight builds his thesis around the power concept, urging the balance of power principle as the central core of all international relations. He feels that "The Balance of Power is as nearly a fundamental law of politics as it is possible to find . . ." (p. 45).

Technology in International Relations, a collection of papers read before the Institute of the Harris Memorial Foundation at the University of Chicago, is concerned with discovering whether there are technological and scientific factors operating in the world today which will make it possible

to predict, with any degree of certainty, the future trends in world affairs. Other contributors, besides the editor, William F. Ogburn, include Hornell Hart, William T. R. Fox, Abbott Payson Usher, Quincy Wright, Robert Leigh, and Bernard Brodie. The technological and scientific factors considered by these authors range from national energy resources, the steam and steel complex, aviation, atomic energy, and mass communication inventions, to the new techniques of war. While the conclusions reached by each of the contributors are somewhat tentative and tenuous, most declared it as their considered opinion that there are technological forces in operation today which will have serious consequences for the future of international relations, although in no single instance did the reviewer find any concrete evidence as to just what pattern the future holds. In several places it is hinted that technology is driving modern man to organize one world politically, although reservations are entered because of technological forces which are divisive as well as unifying. An instance is the use of the radio and the press for propaganda and nationalistic purposes, as well as for furthering international understanding.

One can only conclude that *Technology and International Relations* is only the beginning of an area of studies which may ultimately mature into a "science" of international politics, in the same sense perhaps, in which Marx is said to have brought science to socialism.

R. R. OGLESBY

NOTES

VIIIe Conférence Internationale pour l'Unification du Droit Pénal. Actes de la Conférence. Prepared by L. Cornil, V. Pella and S. Sasserath. Paris: A. Pedone, 1949. pp. 236. International coöperation in the detection and punishment of crime has become a familiar phenomenon in the modern world. Ordinarily this is accomplished by the progressive unification of penal law rather than by international control. The Eighth International Conference of the International Association of Penal Law held in Brussels in July, 1947, the proceedings of which are published in this volume, gave particular attention to "crimes against humanity" and *eo nomine*, to genocide. The conference adopted a Recommendation "that in any international penal code and in all national codes, a clause should be adopted constituting a crime against humanity all acts of homicide or of a nature endangering the life of persons or groups by reason of their race, nationality, religion or opinions" (p. 228). The conference addressed a communication to the Secretary General of the United Nations in support of a convention to carry out the effect of the Recommendation. The conference also adopted a *vœu* that states should repress propaganda tending toward the commission of crimes against humanity.

The conference was held under the auspices of the Belgian Government, although it was unofficial in character. The subject-matter of the Recommendation was discussed at length at the meeting of the General As-

sembly of the United Nations in December, 1948, and the results were embodied in an international convention. The volume will serve as a valuable contribution within a field the literature of which has expanded enormously since the conference was held.

ARTHUR K. KUHN

Estudos de Direito Internacional Privado. By Haroldo Valladão. Rio de Janeiro: Livraria José Olympio, 1947. pp. xiv, 806. These studies cover a period of some fifteen years and an equally wide range of topics; but for all that they have a certain unity due to the constant effort of the author to find a constructive solution for the problems he is treating. The opening essay of eighty pages deals with the development of private international law in the legislation of the American States, and it alone would justify publication of the volume. The author's range of learning is highly impressive, for he does not borrow and repeat the observations of other scholars but pronounces his own independent judgments and shows that he has read the authorities critically. Other essays deal with nationality and military service, succession, property rights as between husband and wife, the extraterritorial effect of divorce decrees, letters rogatory, the uniformity of maritime law, extradition, the status of aliens, and the execution of foreign judgments in Brazil. A closing essay discussing the relation between uniform law and private international law as represented by the Bustamante Code is highly suggestive, and the reviewer only wishes that it might have been elaborated to double its length.

Précis de Droit International Privé Commercial. By P. Arminjon. Paris: Librairie Dalloz, 1948. pp. 620. Index. Fr. 900. With a skill equal to his masterly study of the general problems of international private law (*Précis de Droit International Privé*), Professor Arminjon here gives us a detailed analysis of the problems of that branch of international private law dealing with the special field of commercial relations. Naturally, chief attention is given to the laws of those countries which have adopted commercial codes or in which commercial relations are subject to special laws distinct from the civil law. What are "commercial acts" as distinct from civil acts; who are those "engaged in commerce"; what is to be considered as the "capital" or stock in trade of commerce; what are the different kinds of commercial associations, including the juridical status of foreign associations; what special obligations are assumed in commercial undertakings and what form they take; what are the various kinds of negotiable instruments and the conditions attaching to their validity; what are the forms of commercial contracts; what tribunals are competent in cases of bankruptcy and what measures have been taken to protect the interests of the parties—these are but a few of the numerous problems treated by the author, who makes his Manual all the more useful by references to national codes and to bilateral and multilateral treaties.

La Conferencia de Petrópolis y el Tratado Interamericano de Asistencia Recíproca firmado en Río de Janeiro en 1947. By José Joaquín Cacedo Castilla. São Paulo: Empresa Gráfica da "Revista dos Tribunais" Ltda., 1949. pp. 125. The delegate of Colombia on the Inter-American

Juridical Committee here gives us a detailed examination of the Treaty of Reciprocal Assistance signed at Rio on September 2, 1947. The distinguished jurist first describes the origin of the treaty in the Act of Chapultepec and reproduces in part the addresses which marked the formal meetings of the Conference for the Maintenance of Peace and Security which drew up the treaty. He then proceeds to analyze the articles of the treaty one by one, explaining their general purpose and the interpretation to be given to them. Of particular interest are the comments of the author upon Articles 3 and 6 of the treaty, which create obligations of mutual security, and upon Articles 17 and 20, which deal with voting procedure and the extent of the obligations which may be created for all of the parties to the treaty by the vote of a two-thirds majority. In addition to these commentaries upon the treaty itself the author discusses its relations to the Bogotá Charter and the reservations and declarations entered into the Final Act of the Conference. The volume closes with the text of the Rio Treaty.

C. G. FENWICK

Comentario de la Carta de las Naciones Unidas. By Eduardo Jiménez de Aréchaga. Montevideo: 1949. pp. 107-362. Processed. This stenographic report of lectures given by the professor of public international law in the University of Montevideo, published in mimeographic form, follows the usual lines of a commentary, and it may be compared in that respect with the commentary in English by Goodrich and Hambro. As might be expected, it is of special interest where it discusses those parts of the Charter which deal with matters, such as the scope of domestic jurisdiction, the veto power, and regional arrangements, in respect to which the Latin American delegations dissented from the earlier Dumbarton Oaks Proposals. The difficulty with all such commentaries is that they must be revised from time to time in order to keep up to date; it is to be hoped that the author will find it possible to do this, so that his work may be used widely in the educational institutions of Latin America.

Justiça, Democracia, Paz. By Haroldo Valladão. Rio de Janeiro: Livraria José Olympio, 1948. pp. 413. This collection of articles and addresses by the professor of international law in the University of Brazil is, like his previous publications, but another manifestation of his rare combination of idealism and practical common sense. All of the articles and addresses are short, and some of them are of only passing interest; but as one turns the pages, here and there are sentences and paragraphs which contain words of wisdom and of courage which are characteristic of the author. He has never lost faith in the ultimate triumph of law over force. Solidarity can only be permanent when it is based on law. Justice will only be a vague abstraction until it takes shape in legal principles which have the sanction of the constitution. Democracy begins, the author tells us, in the free spirit of the individual; it takes shape in the law of the state and finally expresses itself in the life of the international community, the highest expression of human relations.

C. G. F.

Year Book of World Affairs, 1949. London: Stevens & Sons, Ltd., 1949. pp. viii, 342. Index. 20 s. This *Year Book* is a collection of

articles covering the world by areas, with additional articles on specific topics. Dr. Schwarzenberger inquires as to the meaning of the term, "international relations." He thinks that it cannot be identified with history, and that the term includes relations between individuals or groups which essentially affect international society as such. Mr. Haden Guest discusses the future of the British Colonial Empire, and expects new Dominions to appear. A sketchy survey of the situation in India is provided by the Rev. A. McLeish. David Thomson surveys the Middle East in France and the emergence of the Third Force. A concise statement of what goes on in the satellite countries of Eastern Europe and the methods of the U.S.S.R. therein is given by Seton Watson. Miss Margaret Ball contributes a compact and useful survey of the Organization of American States and its relation to the United Nations, both political and economic. The problems of China are explained by C. E. Lewisohn, who sees a solution only in a United States of China. A lively story of the appearance of Israel by way of the United Nations is written by Miss Susan Strange, who points out the inconsistencies of United States policy and the inherent limitations of the United Nations. Mr. L. C. Green, after discussing the argument as to the legality of the Little Assembly, concludes that it accomplished very little, even in the field of pacific settlement. Mr. Edvard Hambro, the Registrar of the International Court of Justice, contributes a short survey of the establishment and work of the Court from its beginning. There is an interesting article by L. B. Schapiro on the Soviet attitude toward international organization. He finds that attitude very similar to the attitude of the United States. In the appendix (pp. 223 to 240), he lists the multilateral treaties to which Russia is a party. International lawyers will find especially interesting the survey by J. Daniel of the conflicting claims and arguments concerning the Antarctic area. He suggests solution by an international treaty with supervision by an International Joint Commission, rather than direct administration by the United Nations. An excellent feature of the book is group reviews of books in certain fields. A large number of books are covered, and a large amount of information conveyed.

CLYDE EAGLETON

Documents on American Foreign Relations. Vol. IX. *January 1-December 31, 1947.* Edited by Raymond Dennett and Robert K. Turner. Princeton: Princeton University Press, 1949. pp. xxxii, 759. Index. \$6.00. Ten years of a turbulent record are contained in this series. For the first time this volume covers a calendar year. The first volume covered 1938 and half of 1939, aimed erroneously at the academic year. Any break in a continuing compilation of documents is artificial and the publishers now show the good sense to put out their valuable product in annual volumes frankly designed as the story of what the United States has done in the foreign field from year to year. With the aid of headnotes, that tend to lengthen as problems multiply their facets, each volume embraces more phases of American foreign relations than any other single publication. The value and utility of this volume for 1947 match its predecessors.

The year 1947 saw plans for terminating the war fade, policy toward enemy states drift into indefinite occupation, and economic reconstruction get under way with the Marshall plan and the United Nations regional commissions. The 16 chapters here and there may use a text that is not quite fixed policy or a note that in one's opinion is better given by text, but there is little doubt in general that, as in former volumes, these chapters comprehensively and expertly contain the commitments and political action of the United States in the year covered.

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* Mention here neither assures nor precludes later review.

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CHINA-UNION OF SOVIET SOCIALIST REPUBLICS

COMMUNIQUE¹

NEGOTIATIONS were recently held in Moscow between J. V. Stalin, Chairman of the Council of Ministers of the USSR, and A. Y. Vyshinsky, Minister of Foreign Affairs of the USSR, on the one hand, and Mr. Mao Tse-tung, chairman of the Central People's Government of the People's Republic of China and Mr. Chou En-lai, Prime Minister of the State Administrative Council and Minister of Foreign Affairs, on the other, during which important political and economic questions on relations between the Soviet Union and the People's Republic of China were considered.

These negotiations, which proceeded in an atmosphere of cordiality and friendly mutual understanding, confirmed the desire of both parties to strengthen and develop in every way relations of friendship and co-operation between them, as well as their desire to co-operate for the purpose of ensuring universal peace and the security of the nations.

The negotiations ended in the signing in the Kremlin on February 14 of:

1. A Treaty of Friendship, Alliance, and Mutual Assistance between the Soviet Union and the People's Republic of China;
2. An agreement on the Chinese Changchun Railway, Port Arthur, and Dalny, in accordance with which, after the signing of a peace treaty with Japan, the Chinese Changchun Railway is to be handed over to the complete ownership of the People's Republic of China, and Soviet troops are to be withdrawn from Port Arthur;
3. An agreement on the granting by the Government of the Soviet Union to the Government of the People's Republic of China of long-term economic credits for paying for deliveries of industrial and railway equipment from the USSR.

The aforementioned Treaty and agreements were signed on behalf of the USSR by A. Y. Vyshinsky, and on behalf of the People's Republic of China by Mr. Chou En-lai.

In connection with the signing of the Treaty of Friendship, Alliance, and Mutual Assistance and the agreement on the Chinese Changchun Railway, Port Arthur and Dalny, Mr. Chou En-lai and A. Y. Vyshinsky exchanged notes to the effect that the respective Treaty and agreements concluded on August 14, 1945, between China and the Soviet Union have become invalid, and also that both Governments affirm a full guarantee of

¹ USSR Information Bulletin, Vol. X, No. 4 (Feb. 24, 1950), p. 108; see also New York Times, Feb. 15, 1950, p. 11.

the independent position of the Mongolian People's Republic as a result of the referendum of 1945 and of the establishment with it of diplomatic relations by the People's Republic of China.

Simultaneously, Mr. Chou En-lai and A. Y. Vyshinsky also exchanged notes on the decision of the Soviet Government to hand over gratis to the Government of the People's Republic of China property acquired by Soviet economic organizations from Japanese owners in Manchuria, and also on the decision of the Soviet Government to hand over gratis to the Government of the People's Republic of China all buildings of the former military cantonment in Peking.

The full texts of the aforementioned Treaty and agreements are as follows:

TREATY OF FRIENDSHIP, ALLIANCE, AND MUTUAL ASSISTANCE

*Signed at Moscow, February 14, 1950; ratification announced April 13, 1950*¹

THE Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics and the Central People's Government of the People's Republic of China;

Filled with determination jointly to prevent, by the consolidation of friendship and co-operation between the Union of Soviet Socialist Republics and the People's Republic of China, the rebirth of Japanese imperialism and a repetition of aggression on the part of Japan or any other state which should unite in any form with Japan in acts of aggression.

Imbued with the desire to consolidate lasting peace and universal security in the Far East and throughout the world in conformity with the aims and principles of the United Nations organization;

Profoundly convinced that the consolidation of good neighborly relations and friendship between the Union of Soviet Socialist Republics and the People's Republic of China meets the fundamental interests of the peoples of the Soviet Union and China;

Resolved for this purpose to conclude the present Treaty and appointed as their plenipotentiary representatives:

The Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics—Andrei Yanuaryevich Vyshinsky, Minister of Foreign Affairs of the Union of Soviet Socialist Republics;

The Central People's Government of the People's Republic of China—Chou En-lai, Prime Minister of the State Administrative Council and Minister of Foreign Affairs of China;

¹ USSR Information Bulletin, Vol. X, No. 4 (Feb. 24, 1950), p. 108; see also New York Times, Feb. 15, 1950, p. 11, and April 13, 1950, p. 14.

Who, after exchange of their credentials, found in due form and good order, agreed upon the following:

ARTICLE I

Both High Contracting Parties undertake jointly to take all the necessary measures at their disposal for the purpose of preventing a repetition of aggression and violation of peace on the part of Japan or any other state which should unite with Japan, directly or indirectly, in acts of aggression. In the event of one of the High Contracting Parties being attacked by Japan or states allied with it, and thus being involved in a state of war, the other High Contracting Party will immediately render military and other assistance with all the means at its disposal.

The High Contracting Parties also declare their readiness in the spirit of sincere co-operation to participate in all international actions aimed at ensuring peace and security throughout the world and will do all in their power to achieve the speediest implementation of these tasks.

ARTICLE II

Both the High Contracting Parties undertake by means of mutual agreement to strive for the earliest conclusion of a peace treaty with Japan, jointly with the other Powers which were allies during the Second World War.

ARTICLE III

Both High Contracting Parties undertake not to conclude any alliance directed against the other High Contracting Party, and not to take part in any coalition or in actions or measures directed against the other High Contracting Party.

ARTICLE IV

Both High Contracting Parties will consult each other in regard to all important international problems affecting the common interests of the Soviet Union and China, being guided by the interests of the consolidation of peace and universal security.

ARTICLE V

Both the High Contracting Parties undertake, in the spirit of friendship and co-operation and in conformity with the principles of equality, mutual interests, and also mutual respect for the state sovereignty and territorial integrity and non-interference in internal affairs of the other High Contracting Party—to develop and consolidate economic and cultural ties between the Soviet Union and China, to render each other every possible economic assistance, and to carry out the necessary economic co-operation.

ARTICLE VI

The present Treaty comes into force immediately upon its ratification; the exchange of instruments of ratification will take place in Peking.

The present Treaty will be valid for 30 years. If neither of the High Contracting Parties gives notice one year before the expiration of this term of its desire to denounce the Treaty, it shall remain in force for another five years and will be extended in compliance with this rule.

Done in Moscow on February 14, 1950, in two copies, each in the Russian and Chinese languages, both texts having equal force.

Signed: BY AUTHORIZATION OF THE PRESIDIUM OF THE SUPREME
SOVIET OF THE UNION OF SOVIET SOCIALIST REPUBLICS

A. Y. VYSHINSKY

BY AUTHORIZATION OF THE CENTRAL PEOPLE'S GOVERN-
MENT OF THE PEOPLE'S REPUBLIC OF CHINA

CHOU EN-LAI

AGREEMENT ON THE CHINESE CHANGCHUN RAILWAY, PORT ARTHUR AND DALNY

*Signed at Moscow, February 14, 1950; ratification announced
April 13, 1950*¹

THE Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics and the Central People's Government of the People's Republic of China state that since 1945 radical changes have occurred in the situation in the Far East, namely: Imperialist Japan suffered defeat; the reactionary Kuomintang Government was overthrown; China has become a People's Democratic Republic, and in China a new, People's Government was formed which has united the whole of China, carried out a policy of friendship and co-operation with the Soviet Union, and proved its ability to defend the state independence and territorial integrity of China, the national honor and dignity of the Chinese people.

The Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics and the Central People's Government of the People's Republic of China maintain that this new situation permits a new approach to the question of the Chinese Changchun Railway, Port Arthur, and Dalny.

In conformity with these new circumstances, the Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics and the Central People's Government of the People's Republic of China have decided to

¹ USSR Information Bulletin, Vol. X, No. 4 (Feb. 24, 1950), p. 109; see also New York Times, Feb. 15, 1950, p. 11, and April 13, 1950, p. 14.

conclude the present agreement on the Chinese Changchun Railway, Port Arthur, and Dalny.

ARTICLE I

Both High Contracting Parties have agreed that the Soviet Government transfers gratis to the Government of the People's Republic of China all its rights in the joint administration of the Chinese Changchun Railway, with all the property belonging to the Railway. The transfer will be effected immediately upon the conclusion of a peace treaty with Japan, but not later than the end of 1952.

Pending the transfer, the now existing position of the Soviet-Chinese joint administration of the Chinese Changchun Railway remains unchanged; however, the order of filling posts by representatives of the Soviet and Chinese sides, upon the coming into force of the present Agreement, will be changed, and there will be established an alternating filling of posts for a definite period of time (Director of the Railway, Chairman of the Central Board, and others).

As regards concrete methods of effecting the transfer, they will be agreed upon and determined by the Governments of both High Contracting Parties.

ARTICLE II

Both High Contracting Parties have agreed that Soviet troops will be withdrawn from the jointly utilized naval base of Port Arthur and that the installations in this area will be handed over to the Government of the People's Republic of China immediately upon conclusion of a peace treaty with Japan, but not later than the end of 1952, with the Government of the People's Republic of China compensating the Soviet Union for expenses incurred in the restoration and construction of installations effected by the Soviet Union since 1945.

For the period pending the withdrawal of Soviet troops and the transfer of the above installations, the Governments of the Soviet Union and China will appoint an equal number of military representatives for organizing a joint Chinese-Soviet Military Commission which will be alternately presided over by both sides and which will be in charge of military affairs in the area of Port Arthur; concrete measures in this sphere will be determined by the joint Chinese-Soviet Military Commission within three months upon the coming into force of the present Agreement and shall be implemented upon the approval of these measures by the Governments of both countries.

The civil administration in the aforementioned area shall be in the direct charge of the Government of the People's Republic of China. Pending the

withdrawal of Soviet troops, the zone of billeting of Soviet troops in the area of Port Arthur will remain unaltered in conformity with the now existing frontiers.

In the event of either of the High Contracting Parties being subjected to aggression on the part of Japan or any state which should unite with Japan and as a result of this being involved in military operations, China and the Soviet Union, may, on the proposal of the Government of the People's Republic of China and with the agreement of the Soviet Government, jointly use the naval base of Port Arthur in the interests of conducting joint military operations against the aggressor.

ARTICLE III

Both High Contracting Parties have agreed that the question of Port Dalny must be further considered upon the conclusion of a peace treaty with Japan.

As regards the administration in Dalny, it fully belongs to the Government of the People's Republic of China.

All property now existing in Dalny provisionally in charge of or under lease to the Soviet side, is to be taken over by the Government of the People's Republic of China. For carrying out work involved in the receipt of the aforementioned property, the Governments of the Soviet Union and China appoint three representatives from each side for organizing a joint commission which in the course of three months after the coming into force of the present agreement shall determine the concrete methods of transfer of property, and after approval of the proposals of the Joint Commission by the Governments of both countries will complete their implementation in the course of 1950.

ARTICLE IV

The present agreement comes into force on the day of its ratification. The exchange of instruments of ratification will take place in Peking.

Done in Moscow on February 14, 1950, in two copies, each in the Russian and Chinese languages, both texts having equal force.

Signed: BY AUTHORIZATION OF THE PRESIDIUM OF THE SUPREME
SOVIET OF THE UNION OF SOVIET SOCIALIST REPUBLICS

A. Y. VYSHINSKY

BY AUTHORIZATION OF THE CENTRAL PEOPLE'S GOVERN-
MENT OF THE PEOPLE'S REPUBLIC OF CHINA

CHOU EN-LAI

AGREEMENT ON GRANTING CREDITS TO THE PEOPLE'S REPUBLIC OF CHINA

*Signed at Moscow, February 14, 1950; in force February 14, 1950*¹

In connection with the consent of the Government of the Union of Soviet Socialist Republics to grant the request of the Central People's Government of the People's Republic of China on giving China credits for paying for equipment and other materials which the Soviet Union has agreed to deliver to China, both Governments have agreed upon the following:

ARTICLE I

The Government of the Union of Soviet Socialist Republics grants the Central People's Government of the People's Republic of China credits, calculated in dollars, amounting to 300,000,000 American dollars, taking 35 American dollars to one ounce of fine gold.

In view of the extreme devastation of China as a result of prolonged hostilities on its territory, the Soviet Government has agreed to grant credits on favorable terms of one per cent annual interest.

ARTICLE II

The credits mentioned in Article I will be granted in the course of five years, as from January 1, 1950, in equal portions of one-fifth of the credits in the course of each year, for payments for deliveries from the USSR of equipment and materials, including equipment for electric power stations, metallurgical and engineering plants, equipment for mines for the production of coal and ores, railway and other transport equipment, rails and other material for the restoration and development of the national economy of China.

The assortment, quantities, prices and dates of deliveries of equipment and materials will be determined under a special agreement of the parties; prices will be determined on the basis of prices obtaining on the world markets.

Any credits which remain unused in the course of one annual period may be used in subsequent annual periods.

ARTICLE III

The Central People's Government of the People's Republic of China repays the credits mentioned in Article I, as well as interest on them, with deliveries of raw materials, tea, gold, American dollars. Prices for raw

¹ USSR Information Bulletin, Vol. X, No. 4 (Feb. 24, 1950), p. 110; see also New York Times, Feb. 15, 1950, p. 11. Ratification was announced April 13, 1950.

materials and tea, quantities and dates of deliveries will be determined on the basis of prices obtaining on the world markets.

Repayment of credits is effected in the course of 10 years in equal annual parts—one-tenth yearly of the sum total of received credits not later than December 31 of every year. The first payment is effected not later than December 31, 1954, and the last on December 31, 1963.

Payment of interest on credits, calculated from the day of drawing the respective fraction of the credits, is effected every six months.

ARTICLE IV

For clearance with regard to the credits envisaged by the present agreement the State Bank of the USSR and National Bank of the People's Republic of China shall open special accounts and jointly establish the order of clearance and accounting under the present agreement.

ARTICLE V

The present agreement comes into force on the day of its signing and is subject to ratification. The exchange of instruments of ratification will take place in Peking.

Done in Moscow on February 14, 1950, in two copies, each in the Russian and Chinese languages, both texts having equal force.

Signed: BY AUTHORIZATION OF THE GOVERNMENT OF THE UNION
OF SOVIET SOCIALIST REPUBLICS

A. Y. VYSHINSKY

BY AUTHORIZATION OF THE CENTRAL PEOPLE'S GOVERN-
MENT OF THE PEOPLE'S REPUBLIC OF CHINA

CHOU EN-LAI

REPUBLIC OF COSTA RICA-UNITED STATES OF AMERICA CONSULAR CONVENTION

*Signed at San José, January 12, 1948; in force March 19, 1950*¹

The President of the United States of America and the President of the Republic of Costa Rica, on the basis of that traditional friendship which has always joined the peoples of their respective countries, have agreed to conclude a Consular Convention for the purpose yet further to strengthen this happy relationship through the fostering and development of effective consular representation between the two countries, and, in the premises have appointed as their respective plenipotentiaries:

¹ Senate Executive D, 80th Cong., 2d Sess. Ratified by the President of the United States Sept. 2, 1949. Ratifications exchanged Feb. 17, 1950.

The President of the United States of America:

Mr. John Willard Carrigan, Chargé d'Affaires ad interim of the United States of America;

The President of the Republic of Costa Rica:

His Excellency Licenciado Alvaro Bonilla Lara, Secretary of State encharged with the Office of Foreign Relations

who, after having communicated to each other their full powers and having found them to be in good and due form, have agreed upon the following:

ARTICLE I

1. Each state agrees to receive from the other state consular representatives in those of its ports, places and cities where it may be convenient to establish consular offices and which are open to consular representatives of any foreign state. It shall be within the discretion of the sending state to determine whether the consular office to which such consular representatives shall be appointed or assigned, shall be a consulate general, consulate, vice consulate or consular agency. The sending state may prescribe the consular district to correspond to each consular office.

2. A consular officer of the sending state shall, after his official recognition and entrance upon his duties, enjoy in the territory of the receiving state, in addition to the rights, privileges, exemptions and immunities to which he is entitled by the terms of this convention, the rights, privileges, exemptions and immunities enjoyed by a consular officer of the same grade of the most-favored nation. As an official agent, such officer shall be entitled to the high consideration of all officials, national or local, with whom he has official intercourse in the receiving state.

3. Upon the appointment or assignment of a consular officer to a post within the territory of the receiving state, the sending state shall notify the receiving state in writing of such appointment or assignment. Such notification shall be accompanied with a request for the issuance to such officer of an exequatur or other formal authorization permitting the exercise of consular duties within the territory of the receiving state. Such request shall not be refused without good cause and the exequatur or authorization shall be issued free of charge and as promptly as possible. When necessary a provisional authorization may be issued pending the issuance of an exequatur or formal authorization.

4. The receiving state may revoke any exequatur, formal authorization or provisional authorization if the conduct of a consular officer gives serious cause for complaint. The reasons for such revocation shall be furnished to the sending state through diplomatic channels.

5. (a) The receiving state shall notify the appropriate local authorities of such state of the names of consular officers authorized to act within the receiving state.

(b) A consular officer in charge of a consular office shall keep the authorities of the receiving state informed of the names and addresses of the employees of the consular office. The receiving state shall designate the particular authority to whom such information is to be furnished.

6. Upon the death, incapacity, or absence of a consular officer having no subordinate consular officer at his post, any other consular officer of the sending state to whom an exequatur, formal authorization or provisional authorization has been issued by the receiving state or any person on the staff of the consular office whose name shall previously have been made known to the authorities of the receiving state pursuant to paragraph 5 of this article, may temporarily exercise the consular duties of the deceased or incapacitated or absent consular officer, and while so acting shall enjoy all the rights, privileges, exemptions and immunities previously enjoyed by such consular officer.

7. A consular officer or diplomatic officer of the sending state, who is a national of that state, may have the rank also of a diplomatic officer or of a consular officer, as the case may be, on condition that permission for him to exercise such dual functions has been duly granted by the receiving state and appropriate recognition in a consular capacity has been granted. In any such case such person's rank as a diplomatic officer shall be understood as being superior to and independent of his rank as a consular officer. The exercise of consular duties by any diplomatic officer shall be without prejudice to any additional personal privileges and immunities which might accrue to such officer by reason of his diplomatic status.

ARTICLE II

1. A consular officer who is a national of the sending state and not engaged in a private occupation for gain in the receiving state, shall be exempt from arrest or prosecution in the receiving state except when charged with the commission of a crime which, upon conviction, might subject the individual guilty thereof to a sentence of imprisonment for a period of one year or more.

2. A consular officer or employee shall in civil proceedings be subject to the jurisdiction of the courts of the receiving state except in respect of acts performed by him within the scope of his official duties. He shall not however be permitted to assert that an act was performed by him within the scope of his official duties in any case where a third party shall have been injured as the result of negligence, for which the officer or employee would be responsible under local law, or had reason to believe that the officer or employee was acting in his personal capacity.

3. A consular officer or employee may be required to give testimony in either civil or criminal cases, except as to acts performed by him within the scope of his official duties, or as to any matter cognizable by him only

by virtue of his official status, but the court requiring his testimony shall take all reasonable steps to avoid interference with the performance of his official duties. The court requiring the testimony of a consular officer shall, wherever possible or permissible, arrange for the taking of such testimony, orally or in writing, at his residence or office. A court may not require a consular officer or employee to give evidence as expert witness with regard to the laws of the sending state.

4. A consular officer or employee shall not be required to produce official archives in court or to testify as to their contents.

5. A consular officer or employee who is a national of the sending state and not a national of the receiving state and is not engaged in a private occupation for gain in the receiving state shall be exempt from military, naval, jury, administrative or police service of any character whatsoever.

6. (a) The buildings and premises occupied by the sending state for official consular purposes shall not be subject to military billeting or to expropriation, condemnation, confiscation or seizure, except in accordance with the laws governing the condemnation of property for public purposes and in such case only upon prior payment to the sending state of the full value of the property condemned.

(b) All furniture, office equipment and other personal property located in any building occupied for official consular purposes and all vehicles, including aircraft, used in the performance of the official business of the consular office shall not be subject to military requisition or to expropriation, condemnation, confiscation or seizure.

7. The buildings and premises occupied exclusively as a personal residence by a consular officer or employee who is a national of the sending state and not a national of the receiving state and is not exercising a private occupation for gain in the receiving state shall be afforded comparable protection to that afforded to buildings and premises occupied for official consular purposes, and the personal property of any such consular officer or employee shall be afforded comparable protection to that afforded to the personal property of a comparable nature referred to in subparagraph (b) of paragraph 6 of this article.

ARTICLE III

1. No tax of any kind shall be levied or assessed in the territory of the receiving state by the receiving state, or by any state, province, municipality, or other local political subdivision thereof, in respect of fees received on behalf of the sending state in compensation for consular services, or in respect of any receipt given for the payment of such fees.

2. No tax of any kind shall be levied or assessed in the territory of the receiving state by the receiving state, or by any state, province, municipality, or other local subdivision thereof on the official emoluments, salaries,

wages or allowances received as compensation for his consular services by a consular officer of the sending state who is not a national of the receiving state.

3. The provisions of paragraph 2 of this article also apply to the official emoluments, salaries, wages or allowances received by an employee of the consular office of the sending state who is not a national of the receiving state and whose name has been duly communicated to the appropriate authorities of the receiving state in accordance with the provisions of paragraph 5 of Article I.

4. A consular officer or employee who is a national of the sending state and is not a national of the receiving state, who is not engaged in a private occupation for gain in the territory of the receiving state and who is the holder of an exequatur or other authorization to perform consular duties or whose name has been duly communicated to the appropriate authorities of the receiving state in accordance with paragraph 5 of Article I shall, except as provided in paragraph 5 of this article, be exempt in the territory of the receiving state from all other taxes levied or assessed by the receiving state, or by any state, province, municipality, or other local political subdivision thereof, including taxes or fees levied or assessed on the use or ownership of any vehicle or vessel, including aircraft, or of any wireless, radio or television set or in respect of the driving or operation of any vehicle or vessel including aircraft.

5. (a) The provisions of paragraph 4 of this article shall apply only to taxes in respect of which the consular officer or employee would in the absence of the exemption provided by this article be the person legally liable, and shall not apply to taxes in respect of which some other person is legally liable, notwithstanding that the burden of the tax may be passed on to the consular officer or employee. If, however, a consular officer or employee is entitled to income from sources outside the territory of the receiving state, but that income is payable to him, or collected on his behalf, by a banker or other agent within the territory of the receiving state who is required to deduct income tax on payment of the income and to account for the tax so deducted, the consular officer or employee shall be entitled to repayment of the tax so deducted

(b) The provisions of paragraph 4 of this article shall not apply to:

(1) taxes levied or assessed on the ownership or occupation of immovable property if such property is situated within the territory of the receiving state;

(2) taxes on income derived from property of any kind situated within the territory of the receiving state;

(3) taxes levied or assessed on that part of the estate of a consular officer or employee which is exclusive of property used by him in the performance of his official duties.

(c) For the purpose of clause (3) of subparagraph (b) of this paragraph any part of the estate of a deceased consular officer or employee which would otherwise be subject to taxation in the receiving state which does not exceed in value two times the amount of the official emoluments, salaries or allowances received by the consular officer or employee for the year immediately preceding his death, shall be deemed conclusively to constitute property used by him in the performance of his official duties.

ARTICLE IV

1. All furniture, equipment and supplies intended for official use in a consular office of the sending state shall be permitted entry into the territory of the receiving state free of all customs duties and internal revenue or other taxes whether imposed upon or by reason of importation.

2. The baggage and effects and other articles imported exclusively for the personal use of consular officers and employees and the members of their respective families and suites, who are nationals of the sending state and are not nationals of the receiving state and who are not engaged in any private occupation for gain in the territory of the receiving state, shall be exempt from all customs duties and internal revenue or other taxes whether imposed by the receiving state, or by any state, province, municipality, or other local political subdivision thereof, upon or by reason of importation. Such exemption shall be granted with respect to property accompanying any person entitled to claim an exemption under this paragraph on first arrival or on any subsequent arrival and with respect to property consigned to any such person during the period the consular officer or employee, for or through whom the exemption is claimed, is assigned to or is employed in the receiving state by the sending state.

3. It is understood, however, (a) that the exemptions provided by paragraph 2 of this article shall be accorded in respect of employees in a consular office only when the names of such employees have been duly communicated in accordance with the provisions of paragraph 5 of Article I, to the appropriate authorities of the receiving state; (b) that in the case of the consignments to which paragraph 2 of this article refers, either state may, as a condition to the granting of the exemption provided in this article, require that a notification of any such consignment be given in such manner as it may prescribe; and (c) that nothing herein shall be construed to permit the entry into the territory of either state of any article the importation of which is specifically prohibited by law.

ARTICLE V

1. The sending state may, in accordance with such conditions as may be prescribed by the laws of the receiving state, acquire by purchase, gift, devise, lease or otherwise, either in its own name or in the name of one or

more persons acting on its behalf, the ownership or possession, or both, of lands, buildings and appurtenances located in the territory of the receiving state and required by the sending state for consular purposes. If under the local law the permission of the local authorities must be obtained as a prerequisite to any such acquisition such permission shall be given on application of the sending state.

2. The sending state shall have the right to erect buildings and appurtenances on land, which is owned or held by or on behalf of the sending state in the territory of the receiving state for consular purposes, subject to compliance with local building, zoning or town-planning regulations applicable to all land in the area in which such property is situated.

3. No tax of any kind shall be levied or assessed in the territory of the receiving state by the receiving state, or by any state, province, municipality, or other local political subdivision thereof, on the sending state, or on any person acting on its behalf in accordance with paragraph 1 of this article, in respect of lands and buildings or appurtenances owned or held by or on behalf of the sending state for consular purposes, except taxes or other assessments levied for services or local public improvements by which the premises are benefited. A building, or part of a building, in which a consular office is situated and the rest of which is used as a consular residence is to be regarded as used exclusively for consular purposes.

4. No tax of any kind shall be levied or assessed in the territory of the receiving state by the receiving state, or by any state, province, municipality, or other local political subdivision thereof, on the ownership, possession or use of personal property owned or used by the sending state for consular purposes.

ARTICLE VI

1. A consular officer may place on the outside of the consular office the coat of arms or national device of the sending state with an appropriate inscription designating the office and may fly the flag of the sending state over or by such office. He may also place the coat of arms or national device and display the flag of the sending state on vehicles and vessels, including aircraft, employed by him in the exercise of his consular duties. A consular officer may display the flag of the sending state over or by his residence on the occasions which he considers appropriate.

2. The quarters where consular business is conducted and the archives of the consular office of the sending state shall at all times be inviolable, and under no pretext shall any of the authorities of the receiving state make any examination or seizure of papers or other property in such quarters or archives. When a consular officer is engaged in business within the territory of the receiving state, the files and documents of the consular office shall be kept in a place entirely separate from the place where private or business papers are kept.

3. Official consular correspondence shall be inviolable and the local authorities shall not examine or detain any such correspondence.

ARTICLE VII

1. A consular officer of the sending state, may within his consular district address the authorities of the receiving state, or of any state, province, municipality, or other local political subdivision thereof, for the purpose of protecting the nationals of the sending state in the enjoyment of rights accruing by treaty or otherwise and may register complaints against the infraction of such rights. Failure upon the part of the proper authorities to grant redress or to accord protection may justify interposition through diplomatic channels. In the absence of a diplomatic representative, the principal consular officer stationed at the capital of the receiving state may apply directly to the Government of the receiving state.

2. (a) A consular officer shall, within his consular district, have the right:

(1) To interview, communicate with, and advise any national of the sending state;

(2) to inquire into any incidents which have occurred affecting the interests of any national of the sending state;

(3) to visit, upon notification to the appropriate authority, and have private access to any national of the sending state who is imprisoned or detained by the authorities of the receiving state; and

(4) to assist any national of the sending state in proceedings before or in relations with the appropriate authorities of the receiving state or of any state, province, municipality, or of any local political subdivision thereof.

(b) A consular officer shall be informed immediately by the appropriate authorities of the receiving state when any national of the sending state is confined in prison awaiting trial or otherwise detained in custody within his consular district by such authorities.

3. A national of the sending state shall have the right at all times to communicate with a consular officer of the sending state.

ARTICLE VIII

1. (a) A consular officer of the sending state may within his district:

(1) Authenticate or certify signatures, documents or copies of documents;

(2) prepare, receive, legalize, certify and attest declarations or depositions;

(3) prepare, attest, receive the acknowledgments of, certify, authenticate, legalize and in general, take such action as may be necessary to

perfect or to validate any document or instrument of a legal character;
and

(4) perform such other analogous services as he is authorized to perform by the laws of the sending state;

(b) A consular officer may perform the services specified in subparagraph (a) of this article whenever such services are required by a national of the sending state for use outside of the territory of the receiving state or by any person for use in the territory of the sending state or are rendered in accordance with procedures, not prohibited by the laws of the receiving state, established by the sending state for the protection of its nationals abroad or for the proper administration of its laws and regulations.

(c) A consular officer may also, to the extent permitted by the receiving state and in conformity with authority conferred on him by the sending state, perform the services specified in subparagraph (a) of this article in circumstances other than those provided for by subparagraph (b) of this article whenever the rendition of such services shall be deemed to be necessary or expedient.

ARTICLE IX

1. (a) Whenever the local authorities of the receiving state shall learn that a national of the sending state died in a locality subject to the jurisdiction of the receiving state and that there is not in the receiving state any person appointed by the decedent as his executor or as the representative of his estate or entitled to claim the whole or any part of the proceeds of the estate as his heir or next of kin or as a beneficiary under his will, such authorities shall advise the nearest consular officer of the sending state of the death of the decedent.

(b) Whenever the local authorities of the receiving state shall learn that a decedent, irrespective of his nationality or the place of his residence, left in the receiving state property in which a person known to be a national of the sending state has an interest under the terms of the decedent's will or in accordance with the appropriate laws of descent and distribution, or in any other manner, the local authorities shall furnish the nearest consular officer of the sending state with such information as may be needed by him to protect the interests of such national.

2. (a) In any case where a deceased person leaves property in the receiving state and a legal or equitable interest in such property is held or claimed by a national of the sending state, who is not resident in the territory of the receiving state and is not legally represented there by any person, the consular officer of the sending state in whose district the estate of the decedent is being administered or, if no administration has been instituted, the property is situated, shall have the right, except as such right may be limited by Section 3 of this article, to represent such national as regards his

interests in the estate or property as if valid powers of attorney had been executed by him in favor of the consular officer. If subsequently such national becomes legally represented in the territory of the receiving state and the consular officer is notified to that effect the position of the consular officer will be as if the powers of attorney had become revoked.

(b) The provisions of subparagraph (a) of this article apply whatever the nationality of the decedent and irrespective of the place of his death.

(c) In any case where subparagraph (a) of this article applies, the consular officer shall have the right to take steps for the protection and preservation of the interests of the person whom he is entitled to represent under subparagraph (a). He shall also have the right, in any such case, to take possession of the estate or the property unless other persons, having superior interests, have taken the necessary steps to assume possession thereof. If under the law of the receiving state, a grant or order of a court is necessary for the purpose of permitting the consular officer to exercise the rights which he is entitled to exercise pursuant to this subparagraph such rights shall be recognized by the courts and any grant or order which would have been made in favor of the person whose interests are represented by the consular officer, if he had been present and applied for it, shall be made in favor of the consular officer on his application.

(d) The consular officer shall be permitted to undertake the full administration of the estate whenever and to the same extent as a person, whose interest he represents under subparagraph (a) of this article, would have had the right to administer the estate if he had been present. If by the law of the receiving state a grant by a court is necessary, the consular officer shall have the right to apply for and to receive a grant to the same extent as the person he represents would have had, if such person had been present and applied for it. The court may, however, postpone the making of a grant of administration to the consular officer (with or without the will annexed) for such time as it thinks necessary to enable the person represented by the consular officer to be informed and to decide whether he desires to be represented otherwise than by the consular officer.

3. A consular officer of the sending state may, on behalf of a national of the sending state who is not a resident of the receiving state, receive for transmission to such a person, through channels prescribed by the sending state, any money or property to which such person is entitled as a consequence of the death of any person. Such money or property may include, but is not limited to, shares in an estate, payments made pursuant to Workmen's Compensation laws, or any similar laws, and the proceeds of life insurance policies. The court, agency or person making the distribution shall not, however, be required to make such distribu-

tion through a consular officer. If a court, agency or person does make distribution through a consular officer, it may require him to furnish reasonable evidence of the receipt of the money or property by the person or persons entitled thereto. The authority vested in a consular officer by this section shall be in addition to and not in limitation of the authority vested in him by previous paragraphs of this article.

4. Whenever a consular officer shall undertake the full administration of an estate pursuant to subparagraph (d) of paragraph 2 of this article he subjects himself in his capacity as administrator to the jurisdiction of the court making the appointment for all necessary purposes to the same extent as if he were a national of the receiving state.

5. The provisions of this article shall be subject to any laws of, or regulations issued pursuant to law by, the receiving state providing for, or relating to, war or a national emergency.

ARTICLE X

1. (a) A consular officer of the sending state shall, except as herein after provided, have the right to exercise exclusive jurisdiction over controversies arising out of the internal order of merchant vessels of the sending state and over matters pertaining to the enforcement of discipline on board whenever any such vessels shall have entered the territorial waters of the receiving state within his consular district.

(b) A consular officer of the sending state shall have jurisdiction over issues concerning the adjustment of wages of members of the crews of vessels of the sending state which shall have entered the territorial waters of the receiving state within his consular district and the execution of contracts relating to such wages. Such jurisdiction shall not in any case however, exclude the jurisdiction conferred on the competent authorities of the receiving state under existing or future laws.

2. Notwithstanding the provisions of paragraph 1 of this article a consular officer shall not, except as permitted by the laws of the receiving state, exercise jurisdiction in any case involving an offense committed on board a merchant vessel of the sending state, which offense would be punishable under the law of the receiving state by a sentence of imprisonment for a period of at least one year, or by penalties in excess thereof.

3. A consular officer may freely invoke the assistance of the competent authorities of the receiving state in any matter pertaining to the maintenance of internal order on board a vessel of the sending state which shall have entered within the territorial waters of the receiving state. Upon the receipt by such authorities of the request of the consular officer the requisite assistance shall be given.

4. A consular officer, or a consular employee designated by him, may appear with the officers and crews of the vessels of the sending state

before the judicial and administrative authorities of the receiving state for the purpose of observing any proceedings affecting such persons and rendering such assistance as may be permitted by the laws of the receiving state.

ARTICLE XI

1. A consular officer of the sending state shall have the right to inspect within the ports of the receiving state within his consular district, the merchant vessels of any state destined to a port of the sending state in order to enable him to procure the necessary information to prepare and execute such documents as may be required by the laws of the sending state as a condition to the entry of vessels into its ports and to furnish to the competent authorities of the sending state such information with regard to sanitary or other matters as such authorities may require.

2. In exercising the rights conferred upon him by this article a consular officer shall act with all possible despatch and without unnecessary delay.

ARTICLE XII

1. All arrangements relative to the salvage of a vessel of the sending state wrecked upon the coasts of the receiving state may, unless the vessel shall have been attached by a salvor, be directed by such person as shall be authorized for such purpose by the law of the sending state and whose identity and authority shall have been made known to the authorities of the receiving state by the consular officer of the sending state within whose consular district the wrecked vessel is found, or, in the absence of any such person, by such consular officer.

2. Pending the arrival of the consular officer, who shall be informed immediately of the occurrence of the wreck, or of such other person as may be authorized to act in the premises, the authorities of the receiving state shall take all necessary measures for the protection of persons and the preservation of property. Such measures shall, however, be restricted to those necessary for the maintenance of order, the protection of the interests of the salvors and the execution of the arrangements which shall be made for the entry or exportation of the salvaged merchandise. Such merchandise is not to be subjected to any customs or customhouse charges, unless it be intended for consumption in the receiving state.

3. The intervention of the authorities of the receiving state shall not occasion any expenses except such expenses as may be caused by the operations of salvage and the preservation of the goods saved, or which would be incurred under similar circumstances by vessels of the receiving state.

4. If a wreck is found within a port, or constitutes a navigational hazard within the territorial waters of the receiving state, there shall also be observed those arrangements which may be ordered by the authorities of the receiving state with a view to avoiding any damage that might otherwise be caused by the wrecked vessel to the port facilities and to other vessels.

ARTICLE XIII

For the purpose of this convention the term "national" shall be deemed to include any natural person or juridical entity possessing, as the case may be, the nationality of the receiving or the sending state, and the term "person" shall be deemed to include any natural person or juridical entity.

ARTICLE XIV

1. The territories of the contracting states to which the provisions of this convention apply shall be understood to comprise all areas of land and water subject to the sovereignty or authority of either state, except the Panama Canal Zone.

2. The provisions of paragraph 2, Article I, do not confer upon Consular officials and employees of the United States of America those rights, privileges, exemptions, and immunities conferred to Consular officials and employees of one or more of the Republics of El Salvador, Guatemala, Honduras and Nicaragua, by virtue of Treaties and other agreements which have been entered into or may be entered into between the Republic of Costa Rica and one or more of the Republics of El Salvador, Guatemala, Honduras and Nicaragua.

ARTICLE XV

1. This Convention shall be ratified and the ratifications thereof shall be exchanged at San José, Costa Rica.

The Convention shall take effect in all its provisions the thirtieth day after the day of exchange of ratifications and shall continue in force for the term of ten years.

2. If, six months before the expiration of the aforesaid term of ten years, the Government of neither State shall have given notice to the Government of the other State of an intention to modify or terminate any of the provisions of this Convention or to terminate the Convention upon the expiration of the aforesaid term of ten years, the Convention shall continue in force after the aforesaid term and until six months from the date on which the Government of either State shall have given notice to

the Government of the other State of an intention to modify or terminate the Convention.

IN WITNESS WHEREOF, the respective Plenipotentiaries have signed this Convention and have hereunto affixed their seals.

DONE in duplicate in English and Spanish, in the city of San José, this twelfth day of January, 1948.

JOHN WILLARD CARRIGAN

*Chargé d'Affaires ad Interim
of the United States of America*

[SEAL]

A. B. L.

*Secretary of State Encharged
with the Office of Foreign
Relations*

[SEAL]

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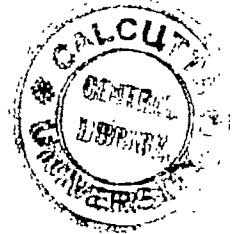
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THE LEGAL EFFECTS OF RECOGNITION

BY PHILIP MARSHALL BROWN

Of the Board of Editors

No branch of international law has been so badly misunderstood and needlessly confused as that of the recognition of new states and new governments. "Recognition has been the football of diplomats who have made it mean anything that suited their purpose. It has certainly been grossly abused as a weapon of diplomatic pressure and intervention. It has in many cases proved to be an insoluble puzzle to the courts whose decisions have been sometimes conflicting and confusing. (It has been a plaything for the political scientists who have taken delight in posing abstract problems of a theoretical nature.)"

There is need for a fresh realistic approach to this subject, unencumbered by diplomatic subterfuges or legal fictions. Our objective is to determine what, if any, are the legal effects of recognition. We will consider the diplomatic precedents, the theories of political scientists and international law publicists, and the decisions of judicial and arbitral tribunals.

In defining recognition, we must realize that no definition is of much value except as the result of a thorough exploration of the subject. (To define is to limit, to restrict, and prejudge the whole field of investigation.) However, for the purpose of this investigation, we may content ourselves with a loose definition of recognition as meaning "the determination of the nature and the extent of the relations between States."* *De jure* recognition means full, complete recognition. It does not refer to the legality of the recognized government. *De facto* recognition means the situation created by the continuance or the establishment of diplomatic relations with a new government, irrespective of its origin.

Much of the confusion concerning recognition has been due to the inevitable difficulty, inherent in all controversial matters, of agreeing on the major premises. There must be an agreed-upon basis for discussion, a fixed point of departure. Most unfortunately, owing to the current disillusionment and general confusion concerning the very nature and the functions of international law, it is not easy to establish such major premises. In attempting to do so my purpose is simply to state the principles which have guided me in my investigation of the problem of recognition.

We should, first of all, define the function of law. In its simplest terms, it is "the protection of interests." Lorimer has defined law as being essen-

* Italics throughout are by the author.

tially, "The Science of Relations. . . . The juridical unity of humanity," and he adds that as a result of this same unity, there exists "the coincidence of human interests as the final lesson of political economy."¹

When we ask what are the interests which concern international law, we must recognize at the outset that they are in reality those of human relationships. (The final object of the law of nations is not the protection of the impersonal interests of juridical entities termed states, governments, or sovereigns. It is the protection of the ordinary common interests of *peoples*.) When Grotius wrote his great work on international law, he was not thinking simply of the rights of *kings*, but of the rights of *peoples*. He was expounding the law *inter gentes, inter populos*. He found in the *Jus Gentium*, which was the original source of private international law, the origins of what is now known as public international law. This law has not been created by sovereign edicts or by international legislation. It has arisen naturally out of the intercourse of peoples and nations. For example, when a sailor was shipwrecked, or traders in foreign lands found themselves in difficulties, their own nations could not fail to be concerned. This inevitably created official contacts, negotiations, and the recognition of mutual rights between nations.

Curiously enough, in the earliest beginnings of such intercourse, foreigners trading with, or residing in, other lands, notably in Egypt, Turkey, and Japan, were accorded special and extensive rights of residence and immunities from local jurisdiction through the system termed "extraterritoriality." They enjoyed the privilege of the administration of their own laws under the authority of their consuls and diplomats. In such simple ways the rudiments of international law gradually expanded into a great body of usages and customs that became legally recognized, very much as the law merchant of England became recognized by the common law. The exigencies of civil war compelled the evolution of rules of insurgency and belligerency involving this very question of recognition. In like manner the whole procedure of the extradition of criminals between nations had its origins in the exigencies of international intercourse.

(The law of nations is a natural growth which has been evolved *ex necessitate juris*.) Jurists of distinction even maintain that true law as a science is "self-created," that there is a logic in all human relationships which compels the acknowledgment of certain basic principles. We must not allow the fact of the gross violations of the law of nations during the past forty years and more to foster either scepticism or ignorance. It is a simple proposition that the fact of the presence of criminals in a community, whether of a state or in the community of nations, does not imply the absence of law. It merely means that administration of the law for the time being is impeded or suspended. Punishment for the violation of law is

¹ *Revue de Droit International* (1884), Vol. XVI, p. 333.

quite distinct from the reason and the virtue of law itself. In the case of international law, while its sanctions have been inadequate, nevertheless, it has been generally respected and applied in long periods of peace. Its basic sanction has been simply and effectively "*the desire for reciprocity and the fear of retaliation.*" It has been a good "Rule of the Road" which the peoples of most nations have respected for their mutual convenience. This basic sanction is the silent policeman that controls international traffic in normal times. The free peoples of the world would distrust and even defy a supra-national policeman serving an international dictatorship.

✓ (Another basic principle is that the law of nations rests upon the free consent of peoples.) It is not a code imposed by a supra-national authority. The peoples of the world are entitled to the utmost respect for their own laws and institutions. They may not be subjected to arbitrary control without danger to international peace. There are many who advocate some form of world government enforcing a "World Law." This may be the ultimate ideal of international society, though it presents obvious difficulties and objections. We must recognize, because of the lack of any basic understanding between peoples concerning legal rights and obligations, that no freedom-loving peoples will ever delegate supreme authority without reserving the right of political protest or judicial redress against governmental interference and injustice. In the present stage of social evolution throughout the world, it is quite evident that peoples have no common standards of democracy, of political institutions, of economics or of social welfare. Until a world government with supreme powers to impose and enforce a supra-national law is created, we must acknowledge that international law depends on the free consent of peoples. Neither the League of Nations nor the present United Nations could possibly alter the fact that the sovereign free independent nations of the world are unwilling and unable to consent to the imposition by a supra-national authority of laws that may be opposed to their own national interests. The evolution of human society in the direction of the development of man's noblest qualities cannot safely be subjected to arbitrary dictatorial control.

✓ { Another basic principle is the major premise that the function of recognition is a voluntary, free, political, diplomatic function. There is no supreme law, no legal compulsion to constrain any government to accord or refuse recognition. The only compulsion is the compulsion of the logic of the facts inherent in each situation.

✓ The fourth basic principle underlying the problem of recognition is that the judiciary, under any democratic system of government, has a function quite separate and different from that of the executive. This function is to protect *human* interests. The court does much more than decide an issue; it applies accepted principles of law that are inherent and latent in all human relationships. While it is obvious that the courts must keep out of politics, it is just as obvious that the executive must not interfere with the

course of justice. There should never be a denial of justice through the failure of the courts to act. Courts exist solely for "the distribution of justice."

The subject of recognition has been unfortunately obscured by political and diplomatic considerations. Recognition has been delayed, refused, or granted for reasons not usually of a legal nature. It has frequently been used as an instrument for intervention. During the first World War, recognition was accorded to Poland and Czechoslovakia by France, Great Britain, and the United States before these new political entities actually existed as independent governments or states. Germany similarly recognized Lithuania for war purposes. *De facto*, "provisional," "limited" or "conditional" recognitions were granted in the instances of Esthonia, Latvia, Georgia, and Armenia pending the determination of their definite international status. Great Britain denied formal recognition to the Provisional Government of Northern Russia, though conducting negotiations with its representatives in London for military coöperation against the Soviet Union.²

The problem of the recognition of the Soviet Union presented many difficulties, legal as well as political. Economic considerations would seem to have been, in most instances, the determining factor in according recognition. Commercial agreements were signed with the Soviet Union by Great Britain and by France, which had the effect of a qualified recognition that greatly puzzled the courts. M. Krassin was received by the British Government as the representative of "a state government of Russia" and "exempt from the process of the courts," though it was expressly denied that the Soviet Government had been officially recognized.³ The United States Government likewise, while refusing to recognize the Soviet Union, nevertheless entered into direct communication with it, was a co-signatory of the Kellogg Pact, and joined with it in international conferences. It expressly denied, however, that in signing the International Sanitary Convention there was any implication of the recognition of the Soviet Government which was also a signatory.

A curious situation arose in Peking when the Soviet Government demanded possession of the old Russian Legation compound, which was actually in the custody of the United States Legation. The American Minister, in delivering the keys to the Russian Legation, disclaimed any intention on the part of the United States Government to recognize the Soviet Union.

Interesting and puzzling complications respecting recognition have been presented by the admission into the League of Nations, and into the United Nations, of states not yet recognized by some of the Members of these organ-

² See lectures by Erich, "*Naissance et Reconnaissance des Etats*," *Académie de Droit International*, The Hague, 1927.

³ See Gemma, "*Les Gouvernements de fait*," *Académie de Droit International*, The Hague, 1924, p. 375.

izations, notably in the case of the new state of Albania after the first World War, and now in the admission of the Russian Ukraine, which can hardly be described as an independent nation. It has been generally held that the presence of non-recognized states and governments in the United Nations is to be regarded as a special conventional arrangement that does not imply full recognition by other Members.⁴

The problem of recognition has naturally been of immediate and great concern to the Republics of the Western Hemisphere, where changes in governments have been frequent and have presented serious diplomatic difficulties, notably in the case of Mexico and Nicaragua during the Administration of President Wilson. Frequent revolutions which did great economic harm and demoralized the relations of many of these republics were naturally of concern to the United States Government. President Wilson, in his devotion to democratic principles, endeavored to fortify the institution of democracy. In the case of the government of General Huerta in 1914, as well as of other revolutionary changes in Nicaragua, El Salvador, and Costa Rica, Wilson enunciated the doctrine of "not according recognition or support to any government which might establish itself unless it demonstrated clearly that it was elected by legal and constitutional means."⁵

This Wilson Doctrine, while supporting constitutional governments in power, actually meant intervention in denying to a people the right to choose their own government by whatever means at their disposal. The recognizing government arrogated to itself the privilege of determining whether a new government was *de jure*, namely, the decision by a foreign Power of internal, sovereign, constitutional matters. The Wilson Doctrine was in harmony with the declaration of Dr. Tobar, former Minister of Foreign Affairs of Ecuador:

The American Republics for the sake of their good name and credit, apart from other humanitarian or altruistic considerations, should intervene indirectly in the internal dissensions of the Republics of the Continent. Such intervention might consist at least in the non-recognition of *de facto*, revolutionary governments created contrary to the constitution.⁶

This doctrine of "legitimacy," so strongly reminiscent of the Holy Alliance, was definitely reversed by the Hoover Administration. In commenting on the unfortunate effects of the Wilson Doctrine on relations between the United States and Mexico, Secretary of State Stimson said:

⁴ See Malbone W. Graham, *The League of Nations and the Recognition of States* (Publication of University of California).

⁵ *Foreign Relations of the U. S.*, 1913, p. 7.

⁶ See Larnaude, "*Les Gouvernements de fait*," *Revue Générale de Droit International Public* (1921), p. 498.

Although Huerta's government was in *de facto* possession, Mr. Wilson refused to recognize it, and he sought through the influence and pressure of his great office to force it from power. . . . In his sympathy for the development of free constitutional institutions among the people of our Latin American neighbours, Mr. Wilson did not differ from the feelings of the great mass of his countrymen in the United States, including Mr. Jefferson and Mr. Adams, whose statements I have quoted; but he differed from the practice of his predecessors in seeking actively to propagate these institutions in a foreign country by the direct influence of this Government and to do this against the desire of the authorities and people of Mexico.

The present administration has refused to follow the policy of Mr. Wilson and has followed consistently the former practice of this Government since the days of Jefferson. As soon as it was reported to us, through our diplomatic representatives, that the new governments in Bolivia, Peru, Argentina, Brazil, and Panama were in control of the administrative machinery of the state, with the apparent general acquiescence of their people, and that they were willing and apparently able to discharge their international and conventional obligations; they were recognized by our Government.⁷

The policy laid down by Jefferson was concisely expressed in a letter to Pinckney, as follows:

✓ We certainly cannot deny to other nations that principle whereon our own Government is founded, that every nation has a right to govern itself internally under what forms it pleases, and to change these forms at its own will; and externally to transact business with other nations through whatever organ it chooses, whether that be a king, convention, committee, president, or whatever it be.⁸

The United States thus finds itself in accord with the policy laid down by the Mexican Government in the statement now known as the Estrada Doctrine issued by the Mexican Secretary of Foreign Relations, Señor Don Genaro Estrada, on September 30, 1930:

✓ After a very careful study of the subject [recognition], the Government of Mexico has transmitted instructions to its Ministers or Chargés d'Affaires in the countries affected by the recent political crises, informing them that the Mexican Government is issuing no declarations in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism, when they decide, favorably or unfavorably, as to the legal qualifications of foreign régimes.

Therefore, the Government of Mexico confines itself to the maintenance or withdrawal, as it may deem advisable, of its diplomatic agents, and to the continued acceptance, also when it may deem ad-

⁷ Address before the Council on Foreign Relations, New York City, Feb. 6, 1931.

⁸ Published Works of Jefferson, Vol. III, p. 500.

visible, of such similar accredited diplomatic agents as the respective nations may have in Mexico; and in so doing, it does not pronounce judgment, either precipitately or *a posteriori*, regarding the right of foreign nations to accept, maintain or replace their governments or authorities. . . .⁹

There have been interesting examples of joint recognition by several governments. The best known example is that of the admission of Turkey into the family of nations by the Treaty of Paris in 1856, signed by Great Britain, Russia, and Italy. This joint recognition naturally provokes the inquiry whether prior to this time, Turkey had existed as a member of the family of nations with the rights and obligations of international law. In spite of the unsatisfactory rule of sultans for centuries and the limitations imposed by the system of extraterritoriality, Turkey enjoyed diplomatic and treaty relations with many nations. This act of recognition by the Treaty of Paris was therefore little more than a polite gesture. During the negotiations for the settlement of the Chaco dispute between Paraguay and Bolivia, the mediating Powers meeting in Washington resolved, "to work together when the moment came for Recognition (of the revolutionary Governments in Paraguay and Bolivia), said action depending upon the acceptance of the Chaco Protocol." Upon the acceptance of this Protocol by both the governments of Paraguay and Bolivia, the conference of the mediating Powers decided to extend recognition.

Another instance of concerted recognition occurred in 1914, when a conference of the three Republics of Argentina, Brazil, and Chile met at Niagara Falls to seek an agreement for the establishment of a provisional régime in Mexico which might be recognized by the United States, in place of the Huerta régime. This was followed by the Conference on Mexican Affairs, which met in Washington in 1915, of representatives from the Argentine, Bolivia, Brazil, Chile, Guatemala, Uruguay, and the United States, to determine the nature of the government which should be recognized in Mexico. Later on, after a careful and impartial consideration of all the circumstances, they unanimously decided to recommend separately to their respective governments that the government of General Carranza should be recognized as the "Government *de facto*."

Still another interesting example of concerted action was that of the Conference in Cannes in 1922 to determine the conditions which the "Principal Allied Powers" of Europe should impose in according recognition to the Soviet Union. The subsequent Conference of Genoa decided that they would not recognize the Soviet Union unilaterally pending a final decision by the Conference. Incidentally, it may be noted that during this Conference, the German Government secretly entered into an arrangement with the Soviet Union for its recognition.

The most striking example of concerted recognition is to be found in the measures adopted by the twenty-one American Republics for the defense

⁹ This JOURNAL, Supp., Vol. 25 (1931), p. 203.

of the Western Hemisphere during the second World War. It should be noted that the Government of Guatemala in the Conference of Mexico which preceded the San Francisco Conference, had already proposed a *lex specialis* as an exception to the law of non-intervention, that "the American Republics should abstain from granting recognition and maintaining relations with anti-democratic régimes which might be established in any of the countries of the Continent." The Government of Chile, at the San Francisco Conference, proposed a similar formula to the effect that "No state without common international agreement may recognize a *de facto* government until it demonstrates that it complies with its international obligations and is determined to return to normal democratic institutions."

The Emergency Advisory Committee for Political Defense of the Continent adopted on December 24, 1943, a resolution (No. XXII) recommending

to the American Governments which have declared war on the Axis Powers or which have broken relations with them, that during the actual World War they should not proceed to the recognition of a new government established by force before consulting among themselves for the purposes of determining whether said government complies with the inter-American agreements for the defense of the Continent, or before effecting an inter-change of information regarding the circumstances which brought about the creation of said government.¹⁰

This recommendation was applied to the violent changes of governments in the Argentine, Bolivia, Ecuador, El Salvador, Guatemala, Haiti, Nicaragua, and Venezuela. It is to be noted in passing that the exchange of information and opinions prescribed by the Committee on Defense continued even after the expiration of the World War.¹¹ However, this proceeding may be considered as exceptional and justified by the circumstances of the war in which so many nations of the Continent found themselves involved. There is no doubt that many of these circumstances persisted even after the end of the war. This exceptional procedure was of the nature of collective intervention without precedent in inter-American relations.

Concerted action of this unusual nature can only be justified as a war measure, a special arrangement between a group of Powers, irrespective of the accepted procedure in international law as, for example, in special agreements between the Republics of Central America. We are concerned only with the larger problem of recognition as applied in the normal intercourse of nations.

From these diverse instances of concerted action we may deduce two general conclusions. One is that the recognition of a new state or a new government is of general and mutual concern, and that unilateral action may embarrass other nations which, for various reasons, whether wise or proper, may prefer to withhold recognition. Nevertheless, we must recognize as a

¹⁰ See Second Annual Report of Emergency Advisory Committee, p. 79.

¹¹ *Ibid.*, p. 16.

second conclusion that in every instance, with the exception possibly of certain conventions, such as the Treaty of Paris in 1856 and the Treaty of Versailles in 1919, each nation reserves complete freedom of decision whether its own interests are best served by the granting or the withholding of recognition. This holds true, as has already been intimated in the case of the League of Nations and of the United Nations, where the participation of non-recognized governments creates certain common relations within the ambit of the Organization. Outside of the Organization, the accepted practice of separate recognition, or of the maintenance or suspension of diplomatic relations, continues. There is no doubt that the contacts within the Organization do not result in recognition, if the clear intention to accord it is lacking. The participation as a Member without doubt presupposes a certain measure of relations but they do not have to be direct or general; recognition is not implied in such contacts. Jules Coucke, commenting on the discussion in the Assembly of the League of Nations concerning the status of Albania, states: "*On peut conclure implicitement de cette discussion que l'Assemblée n'entend pas faire dépendre l'admission d'une reconnaissance de jure préalable des Membres de la Société.*"¹²

There exists considerable literature by political scientists concerning the nature and effects of recognition. The subject certainly lends itself to speculation, though once embarked on this sea one may find oneself lost in unrealistic arguments of a specious nature. For example, there has been much discussion concerning the qualifications necessary to warrant the recognition of a new state. Are the size of a given territory and the number of inhabitants essential factors in according recognition—as, for example, in the case of the little Republic of San Marino in Italy? Of special importance has been the question of the ability of a new state or a new government to comply with its international obligations. It has been objected with reason that recognition should be withheld from any nation which either deliberately or involuntarily fails to fulfill all its international duties. A very interesting problem was presented by the Soviet Union which demanded and received recognition, although it had not accepted the general principles of international law. By recognition the other Powers conceded that the Soviet Union should be admitted to the rights of international law, though it evinced no intention to respect the rights of other nations under the accepted usages of international law. /

Other subjects which have intrigued the political scientists have been whether recognition may be provisional or conditional, whether it is retroactive in effect, or whether it is irrevocable. One theory, which has been stoutly maintained by such eminent political scientists as Hans Kelsen, is that recognition *de jure*, meaning full, complete recognition without reservations, has the effect of creating and establishing rights for the recognized

¹² "*Admission dans la Société des Nations et Reconnaissance de Jure*," *Revue de Droit International et de Législation Comparée* (1921), p. 321.

state which cannot exist prior to recognition. Kelsen even draws a subtle distinction between the recognition of a *de facto* situation which merely acknowledges its existence, and recognition which has a "*constitutif*" effect, namely, confers legal rights.¹³ Problems of this nature certainly deserve careful consideration, but we are more concerned with problems of an immediate practical nature than with theoretical speculations. In the pursuit of this end we find light in recent judicial and arbitral decisions by national and international tribunals.

The confusion of thought concerning recognition revealed in diplomatic precedents has likewise been reflected in court decisions. The courts in the United States, in Great Britain, and—to a lesser extent—in France, have indicated a fear amounting almost to an obsession lest the judiciary, in cases involving recognition, should trespass on what was imagined to be the special prerogative of the executive branch of government. Judges have had more concern to spare the executive embarrassment than to protect the legal interests of private individuals, or of foreign states where sovereign interests were involved. The administration of justice has too often been subordinated to political considerations; judicial independence has been impaired; and a serious misunderstanding of the essential nature of the relations between the peoples of different nations has been fostered. The courts have plainly failed in some instances to understand the function and effects of recognition, as well as the limitations imposed by the demands of simple justice, on the exercise of this function by the executive. Palpable judicial absurdities which have involved the miscarriage of justice have resulted from this attitude of undue deference on the part of the judiciary towards the executive. In one instance the widow of an American citizen who died in Mexico was denied by an American court the right to serve as executrix because she had been designated by a Mexican court during the existence of a *de facto* régime which had not been recognized by the United States Government!¹⁴

In another case, the Soviet Government was not allowed to appear in court to prevent the disbursement of Russian funds which had been deposited in a New York bank. In still another case, funds belonging to the Russian state were turned over by an American court to a minor functionary formerly in the employ of the government of the Czar long after it had ceased to exist!¹⁵ Although the Soviet Union had been recognized by the French Government, the court found it necessary to revive artificially a Russian corporation which had been dissolved by Soviet law, a process which was aptly called "reviving a mummy."¹⁶ In a British case involving the con-

¹³ Lectures at the Hague Academy of International Law, 1932, Vol. IV.

¹⁴ *Pelzer v. United Dredging Co.*, 118 Misc. Rep. 210, 195 N. Y. S. 675.

¹⁵ *Russian Government v. Lehigh Valley R. R. Co.*, U. S. Dist. Ct., N. Y. (1919), 293 F. 138; *Hudson's Cases on International Law*, p. 70.

¹⁶ *Banque Industrielle de Moscou v. Banque Russe pour le Commerce et l'Industrie*, Trib. civ. Seine, May 20, 1921, 50 *Clunet* 533.

fiscation of private property by the Soviet Government, the court was compelled to reverse a former decision by reason of the retroactive effect of *de jure* recognition.¹⁷

Owing to different juristic norms prevailing in countries which had already recognized the Soviet Union, judicial redress of varying degrees could be obtained in one country although denied in another. The same facts were subjected to utterly varying interpretations according to the *forum loci*. In countries where recognition was denied or refused, the courts were placed in the embarrassing situation either of failing to protect Russian private and public interests, or of being constrained to render decisions which logically would be reversed following the recognition of the *de facto* government in Russia.

It should suffice for our present purpose merely to note the judicial confusion created by the failure to understand the nature and the underlying principles of recognition. In spite of this unfortunate situation, however, the problem of recognition is not as hopelessly complicated as might first appear. The subject has seriously preoccupied both publicists and jurists who have sought conscientiously to clarify the problem. Some judges have had the courage to sail out on the badly charted sea of legal precedents in order to find a safe and navigable course for the administration of justice. The absurdities, the paradoxes, and the gross injustice of some of the current fallacies concerning recognition have been intimated. The underlying principles which should control the function of recognition have, however, been adumbrated in certain recent court decisions. Without attempting to reproduce the mass of facts laboriously gathered by juriconsults, or even to give a résumé of their arguments, we may venture to indicate the main principles which seem to underlie and control the function of recognition. If these principles compel acceptance by the force of their own logic, we may escape the necessity of attempting to reconcile the conflicting concepts of diplomats and political theorists, as well as the diverse practices of judicial tribunals. Once these major principles are agreed upon, their practical application would seem to be clear and to offer no serious difficulties. We are warranted by the existing confusion of thought on the subject and the resulting anomalies to make the effort to clarify the problem.

The recognition of a new state naturally entails the recognition of a new government. The elucidation of the problem of the recognition of a new government cannot fail to throw light upon the problem of the recognition of a new state. The key to the whole problem of recognition is to be found in the decision of the United States Supreme Court in the case of *Horn v. Lockhardt*, arising out of the Civil War, which concerned certain acts performed under the Government of the Confederacy. The Court in this case observed that:

¹⁷ *Banque Internationale de Commerce de Petrograd v. Goukassov*, Great Britain, L.B., [1923] 2 K.B. 682.

The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government or the regular administration of the laws. Order was preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer of property regulated, precisely as in time of peace. No one, that we are aware of, seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the Constitution.¹⁸

The principle of "continuity" evoked in this case was admirably enunciated in a decision of the General Claims Commission of Mexico and the United States in the case of George W. Hopkins, an American citizen whose claim to the payment of postal money orders issued during the *de facto* régime of General Huerta was denied by the succeeding Mexican Government on the ground of the illegality of the acts of the Huerta government. In recognizing the validity of this claim, the Commission said, *inter alia*:

Before considering the question of the validity or nullity of acts done by, or contracts entered into with a government administration of this character, it is necessary to state at once the impossibility of treating alike all acts done by such an administration or all transactions entered into by an individual with it. There seems to be a tendency both in jurisprudence and in literature to do so, to declare that all acts of a given administration, the legality of which is doubtful, must have been either valid or void. Facts and practice, however, point in a different direction.

The greater part of governmental machinery in every modern country is not affected by changes in the higher administrative officers. The sale of postage stamps, the registration of letters, the acceptance of money orders and telegrams (where post and telegraph are government services), the sale of railroad tickets (where railroads are operated by the Government), the registration of births, deaths and marriages, and even many rulings by the police and the collection of several types of taxes, go on, and must go on, without being affected by new elections, government crises, dissolutions of parliament, and even coups d'états. A resident in Mexico who cleans the government bureaux or pays his school fee to the administration does not and cannot take into consideration the regularity or even the legality of the present administration and the present congress; his business is not one with personal rulers, not one with a specific administration, but one with the government itself in its unpersonal aspect.

The difficulty of distinguishing between the government itself and the administration of that government arises at the point where the voluntary dealings and relations between the individual and the government agencies administering the government for the time being assume a personal character in support of the particular agencies. To this class belong voluntary undertakings to provide a revolutionary

¹⁸ 17 Wallace 570, 21 L. Ed. 657.

administration with money or arms or munitions and the like. But the ordinary agencies, departments, and bureaux of the government must continue to function notwithstanding its principal administrative offices may be in the hands of usurpers, and in such a case the sale and delivery to these necessary and legitimate agencies of supplies, merchandise, and the like, to enable the government itself in its unpersonal aspect to function is a very different transaction from one having for its object the support of an individual or group of individuals seeking to maintain themselves in office. The character of each transaction must be judged and determined by the fact of the particular case.

A similar distinction arises in the field of international law. There are, on one side, agreements and understandings between one nation and another changing or even subverting its rulers, which are clothed with the character of a free choice, preference, and approval, and which obviously undertake to bear the risks of such a choice. There are, on the other hand, many transactions to which this character is alien. Embassies, legations, and consulates of a nation in unrest will practically continue their work in behalf of the men who are in control of the capital, the treasury and the Foreign Office—whatsoever the relation of these men to the country at large may be. Embassies, legations, and consulates of foreign nations in such capital will practically discharge their routine duties as theretofore, without implying thereby a preference in favour of any of the contesting groups or parties. International payments (for a postal union, etc.) will be received from such government; delegates to an international conference will often be accepted from such government. Between the two extremes here also there is a large doubtful zone, in which each case must be judged on its merits.

Facts and practice, as related to the Huerta administration in Mexico, illustrate the necessity of a cleavage in determining the validity or nullity of its acts.

In the field of international relations the distinction is apparent. Where pre-existing relations with government agencies continued under such circumstances as not to imply either approval or disapproval of the new administration or recognition of its authority, these transactions must be treated as government transactions and binding on it as such rather than transactions had with a particular administration. The routine diplomatic and consular business of the nation continued to be transacted with the agencies assuming to act for the government and which were in control of the Foreign Office, the treasury, and the embassies, legations and consulates abroad. Even the United States, though placing its stamp of disapproval in the most unmistakable manner on the act of Huerta in usurping authority, kept the Embassy in Mexico City open for the transaction of routine business, entrusting it to a *Chargé d'Affaires*, and maintained its Consulates throughout Mexico. Such relations, so maintained were entirely impersonal; they constituted relations with the United Mexican States, with its Government as such, without respect to the status of the individual assuming to act for the Government.¹⁹

¹⁹ Hudson's *Cases on International Law*, p. 155; this JOURNAL, Vol. 21 (1927), p. 161.

These two cases have been cited, not as being necessarily authoritative, but because they throw light on the essential continuity in the life of the state, irrespective of changes of governments or of alterations in the normal administration of civil affairs and justice. It would seem incontrovertible that there is substantially no interruption in the organic life of the community under *de facto* governments. Marriages and divorces occur, children are born, wills are made, inheritances transmitted, property exchanged, contracts signed and executed, litigations carried on and settled, criminals tried and punished; in sum, human relations remain for the most part unaffected by political disturbances. The civil and military authorities exact obedience and coöperation for the protection of the ordinary interests of the community. Contracts essential for the proper performance of the affairs of the community with a *de facto* government differ in no material respect from contracts made with a *de jure* government. Such contracts are those relating to schools, fire department, police department, highways, and the maintenance of the courts of justice. Whatever exceptions may seem necessary to safeguard the national patrimony, as, for example, the alienation of the national domain by a provisional government, are primarily to be decided by the courts, or in rare instances by arbitration. It would seem sufficient for our purpose to emphasize this basic principle of continuity in the external life of the state.

The significance of the principle of continuity and the legal consequences which result from its application can only be fully understood by a consideration of the facts and realities of state life. The question presents itself, what happens within a state when changes in government occur, whether peaceably or by violence; when a *de facto* government like that of Cromwell, or that of the Soviet Union, holds power unopposed for a considerable period of time; or when rival factions variously denoted as insurgents, belligerents, or local *de facto* governments contend for the control of the central government; or when there is a temporary dissolution of the central government and the internal life of the state is carried on by the "paramount," "ascendant" forces of the local *de facto* governments?

The solution afforded by the application of the principle of continuity is of the greatest significance in determining the nature and legal effects of recognition. The acceptance of the principle of continuity in the external relations of the state imposes logically the acceptance of another fundamental principle, namely, the validity of the acts of the provisional *de facto* government. Although Cromwell's government was denounced as an illegal usurpation, no attempt was made after the Restoration to declare its acts null and void. Even the acts of local *de facto* governments in the exercise of the normal functions of civil administration—with reasonable limitations and exceptions—are to be considered valid. Thus, various acts legally consummated by the Paris Commune in 1871 were not questioned. "Nature abhors a vacuum and so does law." It is impossible to conceive of

an utter suspension and denial of human intercourse in civil society. The attempts of governments to create a legal vacuum by declaring null and void all acts of preceding *de facto* governments have been so much at variance with facts and realities as to be absurd. Lord Canning once observed that to erect such a theory would be to assert the doctrine of "the total irresponsibility of non-recognized governments." The Supreme Court of the United States, as has already been indicated, felt constrained to recognize the validity of acts performed during the régime of the Confederacy. In the case of the *Republic of Peru v. The Peruvian Guano Company*, it was held: "If the *de facto* government thus recognized (by Great Britain) is displaced by a *de jure* government, an act of the latter repealing and declaring void the legislative and executive acts of its *de facto* predecessor will not be binding upon the foreign state which had recognized the *de facto* government."²⁰ To paraphrase this decision, it may be asserted that whether a *de facto* government be recognized as lawful or not either by a foreign government or by a succeeding government, the nature of its acts remains unchanged and their legal effects—with rare exceptions—continue to have validity. This incidentally explains still another fundamental principle, namely, the necessity of considering recognition as retroactive. The validity of such acts derives from the simple logic of the situation. Attempts to declare these acts null and void are themselves null and void.

It should be noted that the above decision was confirmed anew, in the Franco-Peruvian Arbitration, by the Permanent Court of Arbitration at The Hague in the case of the *Compagnie Dreyfus*. A like decision was reached by Chief Justice Taft of the United States Supreme Court in his award in the *Tinoco Arbitration Case* between Great Britain and Costa Rica. In this case the restored Government of Costa Rica passed a "Law of Nullities" invalidating all contracts between the *de facto* Tinoco government and private individuals. The United States Arbitrator said: "The question is, must his government [Tinoco's] be considered a link in the continuity of the Government of Costa Rica. I must hold that from the evidence the Tinoco Government was an actual sovereign government."²¹

The significance of the principle of continuity and validity of acts of *de facto* governments cannot be too strongly emphasized. The practical application of this principle leads irresistibly to highly significant conclusions.

Having recognized the essential continuity of life within a state and the validity of the acts of succeeding governments, whether *de facto* or *de jure*, it is obvious that there is a similar continuity in the external relations of states. Abrupt and complete cessation of intercourse of peoples and nations is unimaginable. There can be no absolute international vacuum any more than there can be a vacuum within the state. If it were only by radio, there would still be intercommunication between nations. Even with the sus-

²⁰ Scott's Cases on International Law, p. 67.

²¹ Tinoco Arbitration, 1924, this JOURNAL, Vol. 18 (1924), p. 147.

pension of postal service, there still exist clandestine means of correspondence. In spite of political revolutions and catastrophic alterations in governments, the relations of peoples and of governments as well are numerous. Vital contacts momentarily interrupted are quickly resumed. Commerce in goods as well as in ideas cannot be entirely prevented. Mutual needs and mutual sympathies must be acknowledged. The sojourn of foreigners within a nation undergoing political transformations conduces to contacts with the outside world. The presence of diplomatic and commercial representatives compels the continuance of some form of political intercourse with a new government. Marriages and divorces, exchange of property, contracts, etc., cannot fail to have legal effects of an international character. It is necessary to reiterate and stress the fundamental fact that changes of government, no matter how radical or undesirable from a foreign point of view, cannot effect any serious alteration in the continuity of the external relations of the state.

[It follows logically that though a government, for reasons of its own, may be unwilling to accord full and complete recognition to a *de facto* government of another state, it is compelled to acknowledge the *existence* of the new government. / To deny the fact of its existence would require metaphysical abstractions and juristic fictions that affront common sense. Serious doubts may exist concerning the viability of the new government. Its policies may be distrusted and other governments may hesitate to continue the diplomatic relations maintained with the former government. *The problem, however, is not whether to have relations with the new government: it is simply to determine the nature and the extent of the relations that they will have with it.* If they wish to restrict all relations to trade, they find that official agents are necessary to attend to invoices, notarial acts, in order to facilitate commerce. Such agents may require certain immunities, as in the case of M. Krassin, the Soviet trade representative in England before recognition of the Soviet Union.²² It is of interest to note that in the execution of the Kellogg Pact, the United States Government appealed directly to the Soviet Government to use peaceful measures in the settlement of its controversy with China in 1929, and, though refusing to recognize the Soviet Union, found itself in the curious situation of participating with it in the Preparatory Disarmament Conference in Geneva.

There is a tendency on the part of some publicists to interpret such anomalous situations as "implied recognition." Ignoring for the moment the question whether recognition can ever be implied without some express affirmation indicating the real intention of the recognizing government, it would appear more reasonable to explain such situations by the practical necessity imposed on states to acknowledge frankly the simple fact of the *existence* of a *de facto* government. M. Larnaude asserts the recognition of a

²² *Luther v. Sagor*, [1921] 3 K.B. 532; *Hudson's Cases*, p. 131.

de facto government "is not only dictated by the practical necessities which do not permit interruption in international relations, but it flows from the most essential principles of international law."

It does not seem necessary to adduce additional evidence or arguments to show that states are compelled by practical necessities to take notice of a *de facto* situation and to enter into some form of relation with the new government. Though such relations may be attenuated in form and subject to reservations or protestations, it would appear obvious that in substance they necessarily entail recognition of one kind or another.

It would seem clear that the recognition of a new government is of much greater significance from the political point of view than from the legal. It is more concerned with diplomatic considerations than with legal effects. Recognition does not alter the nature of acts consummated under a *de facto* régime. Once accorded, it entails the retroactive acknowledgment of the validity of such acts from the very origin of the new government. If recognition is refused or long delayed, it may result in diplomatic entraves and embarrassments for the *de facto* government. It most certainly results in serious embarrassments for the non-recognizing government, which may have sought in vain to base the relations of the peoples of the two nations concerned on the untenable fiction of the non-existence of the *de facto* régime and of the nullity of its acts. /

Because of this dilemma it cannot matter very much, from the point of view of legal effect, whether recognition be termed "provisional," "limited," "conditional," *de facto*, or *de jure*. The acknowledgment of a *de facto* situation is *recognition*, no matter how much one may seek to refine its meaning or its legal effects. Relations of any kind with the *de facto* authorities can only result in some form of international commitment. The essential fact is that the respective sovereign wills of two recognized independent states have found expression through authorized representatives of the national will. Dr. Podestá Costa has correctly stated:

*Dans le droit public international moderne, le concept de la légitimité a été remplacé par celui de l'effectivité du gouvernement à l'effet de subsister et d'accomplir comme tel les ordres de la nation et les devoirs de la vie commune internationale. Le gouvernement de facto est une autorité de fait qui émane expressement de la volonté nationale, quelle que soit la forme dans laquelle celle-ci se sera manifestée.*²³

In sum, reasons of state, such as doubts concerning the viability of the *de facto* régime, its ability to express the national will, its incompatibility with existing international conditions, its inability or unwillingness to fulfill the obligations of international law, or to respect the rights of a particular state, and other considerations largely of a political, diplomatic nature, may deter a state from according formal recognition to the new gov-

²³ "La Reconnaissance d'un Gouvernement de Facto par Etats Etrangers," *Rev. Gén. de Droit Int. Pub.*, p. 22.

ernment. All this, however, cannot alter the inexorable fact of the existence of the *de facto* régime, and of the validity of its acts, and of their legal effects. Facts are facts which no diplomatic subterfuges or juridical fictions can obscure, denature, or nullify.

If the facts, principles and conclusions here set forth be accepted, it should not be difficult to clarify the problem of the attitude to be taken by judicial tribunals when confronted by litigations that seem to involve recognition. The embarrassments, the contradictions, the anomalies, the paradoxes, and the apparent miscarriages of justice which have resulted from various judicial decisions in different national courts, would appear to be due to a fundamental misunderstanding both of the nature of recognition and of the legal effects resulting from recognition or from non-recognition.

Starting with the generally accepted principle that recognition is the sole function of the executive branch of government, the courts have been unduly solicitous not to embarrass the executive in the free exercise of this function. They have been quite right in holding that it would be intolerable to have two conflicting expressions of the national will on the subject. But this solicitude, as has been already indicated, has too often resulted in bewildering decisions where the legal rights of individuals and of sovereign states, represented by non-recognized governments, have been either denied or inadequately safeguarded. When the courts acknowledge that recognition is necessarily the proper function of the executive they are not called upon to abdicate their own independent judicial functions in the administration of justice. Neither diplomatic exigencies, nor the dictates of reason, nor the demands of equity, can justify the failure to "give justice."

The primary reason why the courts have not infrequently been led to render decisions of a dubious character would seem to be that they have misunderstood the nature of recognition and have attached to it erroneous legal consequences. And this misunderstanding has been due to the failure to apply the principle of the continuity of the life of the state, both internally and externally. Once the courts have grasped the fundamental significance of this principle, the solution of most of the cases involving the rights of private individuals and of sovereign states, under an unrecognized *de facto* government, becomes relatively simple, due allowance being made for variations in the organic laws of different countries.

Fortunately, there are to be found in certain recent judicial decisions, as well as in the writings of juriconsults, indications of the restricted significance of recognition and of its legal effects. They serve to simplify greatly the main problem and to obviate the necessity of a detailed discussion of complicated points of law which concern principally the domain of private international law, and other collateral subjects of public international law, such as insurgency, belligerency, and responsibility of states. It should suffice for our purpose merely to cite various juristic opinions in order to determine in a broad sense the legal effects of recognition:

If a foreign state is recognized by this country (Great Britain), it is not necessary to prove that it is an existing state; but *if it is not so recognized, such proof becomes necessary*. I take the rule to be this—if a body of persons assemble together to protect themselves, and support their independence, and make laws, and have courts of justice, that is evidence of their being a state.²⁴

* * *

Practically all of the cases on the right of a state to sue proceed upon the theory that the state is continuous and *the right of action really resides in the aggregate body of the people who are merely represented by particular governmental organizations which may change in character and personnel*.²⁵

* * *

In the absence of any government in Mexico, a fact to which the President's statement is conclusive upon us, *the rule by paramount force in any particular district is provable as a matter of fact by evidence* which in this case is neither left in doubt nor subject to possible inference to the contrary.²⁶

* * *

That the court is bound by the recognition of the political branch of its own government, and can and should look no further, is a proposition so well settled and so well grounded in common sense and in the necessities of orderly procedure that further discussion is unnecessary. . . .

It may, however, be observed that *the importance of recognizing governmental continuity, quite irrespective of considerations as to the existing form of a foreign government, or as to the human beings in control at any particular time, is well illustrated in this case*, where it is sought to deprive a foreign state forever of the opportunity to be heard in an effort to recover for the loss of property which belonged to the foreign state, *i.e.*, the "Russian Government," by whatever name called. It may also be noted, in passing, that the executive and judicial branches of the government have recognized "the present government of Russia in proceedings to naturalize Russian subjects."²⁷

* * *

Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War. In those litigations, acts or decrees of the rebellious governments, which, of course, had not been recognized as governments *de facto*, were held to be nullities when they worked injustice to citizens of the Union, or were in conflict with its public policy. . . . On

²⁴ *Yrissari v. Clement*, Great Britain, 1826, 3 Bing. 432; *Scott's Cases*, p. 19.

²⁵ *State of Yucatan v. Argumedo*, N. Y. Sup. Ct., 1915, 19 Misc. Repts. 547; 157 N. Y. S. 219.

²⁶ *O'Neill v. Central Leather Co.*, N. J. Ct. of Errors and Appeals, 1915, 87 N. J. Law, 552, 94 A. 789; *Hudson's Cases*, p. 163.

²⁷ *Russian Government v. Lehigh Valley Railroad Co.*, U. S. Dist. Ct. of N. Y., 1919, 293 F. 133. See *Hudson's Cases*, p. 70.

the other hand, acts and decrees that were just in operation and consistent with public policy were sustained not infrequently to the same extent as if the governments were lawful. . . . These analogies suggest the thought that, subject to like restrictions, *effects may at times be due to the ordinances of foreign governments which, though formally unrecognized, have notoriously an existence as governments de facto*. Consequences appropriate enough when recognition is withheld on the ground that rival factions are still contending for the mastery may be in need of readjustment before they can be fitted to the practice, now a growing one, of withholding recognition whenever it is thought that a government, functioning unhampered, is unworthy of a place in the society of nations. Limitations upon the general rule may be appropriate for the protection of one who has been the victim of spoliation, though they would be refused to the spoliator or to others claiming under him. We leave these questions open. At the utmost, they suggest the possibility that *a body or group which has vindicated by the course of events its pretensions to sovereign power, but which has forfeited by its conduct the privileges or immunities of sovereignty, may gain for its acts and decrees a validity quasi governmental, if violence to fundamental principles of justice and to our own public policy might otherwise be done.*²⁸

* * *

Whether or not a government exists clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force, is a fact, not a theory. For it, recognition does not create the state although it may be desirable. So only are diplomatic relations permitted. Treaties made with the government which it succeeds may again come into effect. It is a testimony of friendly intentions. Also in the country granting the recognition, that act is conclusive as to the existence of the country recognized. . . . Again, recognition may become important where the actual existence of a government created by rebellion or otherwise becomes a political question affecting our neutrality laws, the recognition of the decrees of prize courts and similar questions. But except in such instances *the fact of the existence of such a government whenever it becomes material may probably be proved in other ways.* . . . Here, however, we need no proof. The fact is conceded. We have an existing government (Russian Soviet), sovereign within its own territories. There, necessarily, its jurisdiction is exclusive and absolute. It is susceptible of no limitation not imposed by itself. This is the result of its independence. It may be conceded that its actions should accord with natural justice and equity. If they do not, however, our courts are not competent to review them. *They may not bring a foreign sovereign before our bar*, not because of comity, but because he has not submitted himself to our laws. Without his consent he is not subject to them. *Concededly that is so as to a foreign government that has received recognition.* . . . *But whether recognized or not the evil of such an attempt would be the same.*²⁹

²⁸ Sokoloff v. National City Bank, U. S. Ct. App., N. Y., 1924, 239 N. Y. 158, 145 N. E. 917. See Hudson's Cases, p. 118.

²⁹ Max Wulfsohn et al. v. Russian Socialist Federated Soviet Republic, U. S. Ct. App., N. Y., 1923, 234 N. Y. 372. See Hudson's Cases, p. 89.

The fall of one governmental establishment and the substitution of another governmental establishment which actually governs; which is able to enforce its claims by military force and is obeyed by the people over whom it rules, must profoundly affect all the acts and duties, all the relations of those who live within the territory over which the new establishment exercises rule. Its rule may be without lawful foundation; but *lawful or unlawful, its existence is a fact and that fact cannot be destroyed by juridical concepts*. The State Department determines whether it will recognize its existence as lawful, and until the State Department has recognized the new establishment, the courts may not pass upon its legitimacy or ascribe to its decrees all the effect which inheres in the laws or orders of a sovereign. The State Department determines only that question. *It cannot determine how far the private rights and obligations of individuals are affected by acts of a body not sovereign or with which our government will have no dealings. That question does not concern our foreign relations. It is not a political question, but a judicial question*. The courts in considering that question assume as a premise that until recognition these acts are not in full sense law. Their conclusion must depend upon whether these have nevertheless had such an actual effect that they may not be disregarded. In such case we deal with result rather than cause. *We do not pass upon what such an unrecognized governmental authority may do, or upon the right or wrong of what it has done; we consider the effect upon others of what has been done, primarily from the point of view of fact rather than of theory.* . . .

. . . *We give or deny the effect of law to decrees or acts of foreign governmental establishment in accordance with our own public policy; we open or close our courts to foreign corporations according to our public policy, and in determining our public policy in these matters common sense and justice must be considerations of weight.* . . .

. . . *We grant admission to the courts of this State to foreign corporations because of comity. We have not admitted to our comity the Soviet Republic, and the plaintiff denies allegiance to it. The claim based upon comity with a government of the Czar which may exist as a juridical concept but is in fact not functioning and is without representation here is tenuous. It should not prevail where injustice follows to one of our own nationals.*³⁰

* * *

Par trois fois, les 2 & 9 Septembre 1891, la justice anglaise à accueilli les demandes qu'ils lui présentaient (agents du gouvernement Congressiste en Chili) et cependant, circonstance capitale à relever, le gouvernement de la Grande Bretagne n'avait pas reconnu officiellement le gouvernement congressiste, maître en fait de la capitale du Chili, des villes principales, de la flotte, de l'armée et de tous les organes gouvernementaux.

A l'heure où ces lignes sont écrites, les autres gouvernements européens, pas plus que l'Angleterre, n'ont accordé au gouvernement congressiste la reconnaissance officielle. Ces baptêmes diplomatiques entraînent des pourparlers et des procédures que pour des motifs divers, les chancelleries n'aiment pas à précipiter. Supposons que, dans l'intervalle, ce gouvernement soit obligé de recourir à la justice française, allemande, italienne, etc. Les

³⁰ *Russian Reinsurance Co. et al. v. Francis R. Stoddard, Jr., Supt. of Insurance of the State of New York, et al. U. S. Ct. App., N. Y., 1925, 240 N. Y. 149. See Hudson's Cases, p. 106.*

tribunaux de ces pays lui denieront-ils le droit d'estimer en justice au nom de Chili sous prétexte que leurs gouvernements respectifs ne lui ont pas encore apposé le timbre officiel? Ce serait tout à la fois injuste et ridicule. Le Chili est un Etat dont la vie internationale ne peut être suspendue, sans le plus grave préjudice: de plus, le gouvernement congressiste est le seul existant actuellement au Chili.

Comme tout être vivant et organisé, il a droit à la distribution de la justice. Il ne saurait, du fait de la lenteur des formalités diplomatiques, être mis hors la loi pendant un temps indéfini.

*On voit par cet exemple combien est inadmissible la théorie de la nécessité pour le juge national de refuser audience à tout gouvernement étranger, dont l'existence est certaine, incontestée, par cette raison que son gouvernement ne lui a pas octroyé la reconnaissance solennelle.*³¹

* * *

The non-recognition of the Soviet Government has the sole consequence that, in the field of International Law, this Government has no qualification for representing Russia in Switzerland, either in matters of public law or in those of private law. *But this circumstance does not prevent the Russian law from existing and from having its effects.*³²

* * *

The Government of the U. S. has not accorded recognition to the administration now functioning in Mexico, and therefore has at present no official relations with that administration. This fact, however, does not affect the recognition of the Mexican state itself, which for years has been recognized by the U. S. as an "international person," as that term is understood in international practice. The existing situation simply is that there is no official intercourse between the two states.³³

* * *

En Allemagne la question de la reconnaissance ou de la nonreconnaissance du gouvernement soviétique ne présente aucun intérêt pour notre problème. Le droit international privé allemand ne la pose du tout; on se demande seulement quel est le droit en vigueur en Russie au moment où le jugement est prononcé et on recherche en outre si ce droit en vigueur en Russie peut être appliqué en Allemagne. . . .

. . . Il faut considérer, comme droit du pays d'origine d'un émigré Russe, le droit présentement en vigueur en Russie et non pas le droit d'antan. Ce droit sera toujours appliqué sauf dans les cas concrets où son application porterait atteinte au fondement de la vie publique et économique allemande.³⁴

* * *

³¹ Chronique en Clunet, 1891, p. 886, concerning the cases City Bank, Balfour, Williamson et Cie. et al., Royal Mail Steam Packet Co.; Matte et Ross c. Société des Forges et Chantiers.

³² Hausner v. Banque Internationale de Commerce de Petrograd, 1924, Arrêts du Trib. Fed. Suisse, Vol. 50, II, 507 (582). Cited by Habicht in this JOURNAL, Vol. 21 (1927), p. 238.

³³ The Court granted an injunction demanded by the Mexican Government. The United States of Mexico v. National Bank of Haverhill, this JOURNAL, Vol. 17 (1923), p. 743.

³⁴ M. Freund, "La Révolution Bolchévique et le Statut juridique des Russes," Journal de Droit International Privé, 1924, p. 5.

Il y a lieu de penser que, l'évolution des choses aidant, les juges des différents Etats, mis en face du droit soviétique, ne recourront à la notion de l'ordre public et ne se refuseront à appliquer la loi russe que dans les cas où l'application de cette loi viendrait à porter atteinte directement aux principes essentiels de leur organisation politique et sociale. La notion d'ordre public n'aura pas pour conséquences d'entraîner ainsi un *non passum* absolu et catégorique: elle ne constituera qu'une sorte de "soupape de sûreté" qui permettra au juge de poursuivre prudemment un travail d'adaptation laborieux entre des points de vue juridique extrêmes et opposés.³⁵

Limitations of space preclude the further citation of precedents, judicial decisions, and opinions of jurists. Enough has been presented, it is hoped, to justify the following main conclusions:

The recognition of a new state or government is a political, diplomatic function, not a judicial one having specific legal effects. It is determined by reasons of expediency and high state policy. No state or group of persons organized politically has a legal claim to recognition, though it may possess strong moral claims.

A *de facto* state of affairs in the international relations of peoples may exist that logically requires acknowledgment. The question presented is not whether there shall be recognition, but what form it shall take, whether complete and formal, or limited.

"Recognition '*de jure*' results either from an express declaration or from a positive act indicating clearly the intention to grant this recognition, such as the establishment of diplomatic relations."³⁶

Recognition "*de jure*" of a new state, once formally accorded, is irrevocable. It does not imply an arbitrary power to alter capriciously the inexorable facts of international intercourse.

"Recognition '*de jure*' is retroactive in its effects from the date when the new state actually began to exist as an independent state."³⁷

"Recognition '*de jure*' of a new government is retroactive in its effects from the date when it began to exercise its authority."³⁸

Irrespective of recognition or non-recognition, the courts may take cognizance of any fact pertinent to the protection of private and public rights, including the acknowledgment of the existence of a new state or government.

The official acts, laws, and judicial decisions emanating from a *de facto* régime may not be ignored or regarded as non-existent. If performed in the normal course of civil and judicial administration, such acts, laws, and

³⁵ André Prudhomme, *ibid.*, p. 7.

³⁶ See Resolutions adopted by the *Institut de Droit International*, this JOURNAL, Supp., Vol. 30 (1936), p. 185. The author of the present article was gratified as *Rapporteur* of the Commission of the *Institut* concerning the Recognition of New States and New Governments to receive the almost complete confirmation of the views and conclusions here presented.

³⁷ *Ibid.*, p. 186.

³⁸ *Ibid.*, p. 187.

decisions, with rare exceptions, such as treaty rights, are to be deemed valid.

The *Institut de Droit International* in its Resolutions adopted in Brussels, 1936, declared that:

Recognition "*de jure*" of a government implies the recognition of the judicial, administrative or other organs, and the attribution of extraterritorial effects to their acts, in conformity with the rules of international law and particularly under the customary reservation of respect for public order, even if these acts had been consummated before any previous *de facto* recognition.

These extraterritorial effects, however, do not depend on the formal act of recognition of the new government. Even in the absence of recognition, they should be acknowledged by the competent jurisdictions and administrations when, considering especially the actual character of the power exercised by the new government, these effects are in conformity with the interests of good justice and the interest of individuals.³⁹

The determination of what constitutes an exception to public order lies in the competence of the tribunals called upon to give extraterritorial effect to the acts of a non-recognized government.

Inasmuch as recognition is strictly a political, diplomatic function, it has no specific legal effects other than by such special agreements as may have been made at the time of recognition.

³⁹ *Ibid.*

THE RELATION OF INTERNATIONAL LAW TO INTERNAL LAW IN THE FRENCH CONSTITUTIONAL SYSTEM

BY LAWRENCE PREUSS

Of the Board of Editors

During the five years that have elapsed since the close of hostilities in World War II, approximately one-half of the nations of the world have adopted new constitutions or have drastically revised existing ones. While some constitutions have been the products of a more or less regular modification, others have marked a revolutionary, though peaceful, development in conformity with Western political traditions. Some have followed the re-emergence of nations in defeat, and others have signalized the birth of new members of the family of nations. Finally, the régimes of the "People's Democracy" have established instruments of government which are revolutionary both in their origin and their content.

Nearly all of the new constitutions, with the significant exception of those last mentioned, contain provisions which directly affect international law and relations, in addition to the usual texts with regard to the conclusion, ratification and promulgation of treaties. Inspired by the hope of a more stable and peaceable order which the establishment of the United Nations seemed to justify, postwar constituent bodies have provided for the renunciation of aggressive warfare, for recourse to pacific procedures for the settlement of disputes, for limitation of sovereignty necessary for participation in international organizations, and, in varying degree, for the more effective enforcement of international legal obligations through internal law.¹

The present article is restricted to an analysis of the provisions of the new French Constitution² which determine or clarify the relationship of international law to internal law, or which provide for the internal application and enforcement of the rules of customary and conventional international law. Such a survey must necessarily be of a preliminary and tenta-

¹ For a general survey, see B. Mirkine-Guetzévitch, "*Les tendances internationales des nouvelles constitutions*," *Revue générale de droit international public*, Vol. 52 (1948), pp. 375-386; and, for studies of international law provisions in earlier constitutions, "*Droit international et droit constitutionnel*," *Recueil des Cours, Académie de Droit International*, Vol. 38 (1931-IV), pp. 311-465; and *Droit constitutionnel international* (Paris, 1933).

² In force Oct. 27, 1946. *Journal officiel* (Oct. 28, 1946), Supplement No. 27. English text, based on a translation by the French Embassy, Information Division (New York), in Amos J. Peaslee, *Constitutions of the Nations*, Vol. II (Concord, N. H., 1950), p. 9.

tive nature, not only because of limitations of space, but also because of the scantiness of the records of *travaux préparatoires* and the brevity of the legal experience under the new basic instrument. Within these limits an attempt will be made to ascertain the positive legal effect of the constitutional innovations and to assess the degree of progress (or, at least, of change) which they represent. The new provisions reflect, more or less clearly, certain conceptions with regard to the hierarchical relationship between the two legal orders, or, perhaps, their essential identity or unity. The reciprocal influence of legal practice and legal theory will be noted where it is discernible, but without participation in the interminable controversy waged by advocates of dualism or pluralism, on the one hand, and monism, both juridical and sociological, on the other. This is not to deprecate the high importance of legal theory, but merely to endeavor consciously to avoid an approach determined by a solution adopted *a priori*, with the result that the solutions of positive law might be viewed as unwelcome and disfiguring flaws in the symmetry of a preconceived system.³ Even a preliminary survey of the constitutional practice of a single country may, perhaps, make some contribution toward a long-awaited, and necessarily co-operative, study of the actual practice of nations with regard to the internal application of international law, based upon a rigorously positive, but not positivist, approach, and conducted by persons not already too firmly wedded to any particular theoretical view.

By an innovation over previous French constitutions, which were silent with regard to the relation of customary international law to internal law, Paragraph 14, Clause 1, of the Preamble to the Constitution of 1946 provides that: "The French Republic, faithful to its traditions, abides by the rules of international public law."⁴ This provision is merely declaratory,

³ See, for example, Triepel's complaint that "the agreements which states conclude . . . are rarely drafted in a manner that corresponds to the veritable nature" of interstate relations. Heinrich Triepel, *Droit international et droit interne* (trans. by R. Brunet, Paris, 1920), p. 21. That is, they are often not so drafted as to conform to his own dualist doctrine that a treaty creates a legal relationship exclusively between the contracting states, and, therefore, can have no effect in the internal legal order unless it has been transformed into corresponding provisions of internal law, in which case it is solely the latter that creates rights and duties for organs of the state and for individuals. Compare the comments of Kopelmanas on the "*trésors d'ingéniosité*" expended by the adherents of juridical monism in their efforts to reconcile the primacy of international law and the unity of the legal order with the internal validity of legislation enacted and applied in violation of prior treaty obligations. Lazare Kopelmanas, "*Du conflit entre le traité international et la loi interne*," *Revue de droit international et de législation comparée*, Vol. 64 (1937), pp. 337-340.

[All translations in the present article, unless otherwise indicated, are the writer's.]

⁴ The translation in Peaslee (note 2, *supra*) omits the adjective "public," which modifies the term "law." This curious variation of the usual phrase "*droit international public*" has given rise to speculation as to its precise significance. In the opinion of Jacques Donnedieu de Vabres, "The expression '*droit public international*' relegates the distinction between international law and internal law to the second plane; it

and represents no modification of prior practice concerning the relationship of the two legal orders. Like other Continental courts, the French tribunals have regarded the rules of customary international law as directly applicable whenever they are relevant to the adjudication of an issue of which they have jurisdiction, and concerning which there is no controlling legislative or executive act.⁵ They appear never to have doubted that they, as well as other organs of the French state, were obligated to apply the rules of international law in any appropriate case, although they have developed no coherent doctrine of "adoption" or "incorporation" as the basis of this obligation.⁶ On the other hand, they have not been influenced by the doctrines of dogmatic dualism, which would require the specific "transformation" of a rule of international law into one of internal law as a prerequisite to its judicial application.

The application of international law *per se* may briefly be illustrated by reference to cases relating to the immunities of foreign states and diplomatic agents, which in France rest upon no legislative basis, or upon one so slight that the entire structure may be viewed as having a customary foundation. Thus the Correctional Tribunal of Le Havre has held that members of the Belgian Government installed on French territory during World War I were entitled to the privileges of personal inviolability and extritoriality "without there being any need to embody them in a law or decree. . . ."⁷ The principle of immunity, the Court of Cassation has de-

tends to reduce its importance, and to restore to public law its unity. . . . It should be interpreted as a refusal to make of this distinction . . . the *summa divisio* of law, as marking an intention to establish more intimate bonds, a more continuous communication between the two systems of law." "La Constitution de 1946 et le droit international," *Recueil Dalloz* . . . hebdomadaire (1948), *Chronique II*, p. 6.

⁵ It has sometimes been assumed that the direct judicial application of customary international law is confined to British and American practice, and that Continental tribunals are competent to apply only such rules as have been transformed into the provisions of a code. See Quincy Wright, "International Law in its Relation to Constitutional Law," this JOURNAL, Vol. 17 (1923), p. 38. Compare H. Lauterpacht, "Règles générales du droit international de la paix," *Recueil des Cours, Académie de Droit International*, Vol. 62 (1937-IV), pp. 137-140.

⁶ French jurists have paid surprisingly little attention to this problem, but have concerned themselves almost exclusively with that of the internal legal effect of treaties. Thus, Charles Rousseau, in his comprehensive treatise, devotes some 50 pages to the "Effets du traité à l'égard des gouvernants" and "à l'égard des gouvernés," but not more than a single page to the subject here under discussion. *Principes généraux du droit international public*, Vol. I (Paris, 1944), pp. 389-441, 851.

⁷ *Aff. D.*, Nov. 15, 1915, *Journal de droit international*, Vol. 43 (1916), p. 164.

In the case of *Dients v. de la Jara*, July 31, 1878, Civil Tribunal of the Seine, *ibid.*, Vol. 5 (1878), p. 500, it was held that the immunity of diplomatic agents, "consecrated by the law of nations, . . . must be respected by the courts as a rule of *ordre public supérieur*, which they must follow and which prevails over all the prescriptions of private law. In France, this principle has always been acknowledged and followed. Although it has not entered into our Civil Code, the debates thereupon show clearly, nevertheless,

clared, is derived from "the reciprocal independence of states," which is "one of the most universally recognized principles of the law of nations. . . ."⁸ Recently, the immunity of a vessel requisitioned by the Dutch Government and affected to a purpose of public interest was recognized solely upon the basis of the customary principle and without reference to the text contained in the Preamble to the Constitution of 1946.⁹ In *État français v. Établissements Monmousseau*, decided by the Court of Appeal of Orleans in 1948, it was held that the Ordinance of April 25, 1945, providing for the nullity of acts of spoliation committed by the enemy, must be construed as applicable solely to transfers of property made in derogation of "the rules and usages of international law," as declared in Articles 53 and 55 of the Fourth Hague Convention of 1907.¹⁰

that it was present in the minds of the drafters, and that they intended to maintain it, even though they did not embody it in a written rule of law, which, in their opinion, could find no place in a law relating to the internal régime." The significant point is that a proposed article providing expressly for diplomatic immunities was withdrawn on the sole ground that it pertained to the law of nations, and, therefore, was not a proper subject for internal legislation. See Maurice Travers, *Le droit pénal international*, Vol. II (Paris, 1921), p. 304; and case cited in the following note.

⁸ *Gouvernement espagnol v. Lambège et Pujol*, Jan. 22, 1849 (*Ch. civ.*), Sirey, *Recueil général des lois et des arrêts* (1849), Pt. I, col. 81.

Ruth D. Masters deduces, from judicial references to rules stated to have "always been acknowledged and followed" in France, or "universally recognized," that "French courts require that a rule of international law, in order to be binding upon them, must either be universally recognized, or have received the assent of France. . . ." International Law in National Courts (New York, 1932), p. 179. Such a deduction is wholly without warrant, and results from an attempt to give a universal application to the positivist, dualist doctrines of Laband and Triepel. Furthermore, it fails to take into account the influence of natural law concepts upon French jurisprudence in its formative stage. See Paul Challine, *Le droit international public dans la jurisprudence française de 1789 à 1848* (Paris, 1934), pp. 272-273.

The text proposed before the Constitutional Committee of the first National Constituent Assembly of 1946 referred, at one stage of its drafting, to conformity with the "universal rules of international public law." Upon the objection of M. Coste-Floret that the adjective "*universelles*" would represent a "regrettable restriction," the present terminology was substituted. *Assemblée Nationale Constituante (Élus le 21 Octobre 1945); Séances de la Commission de la Constitution: Comptes rendus analytiques* (Paris, 1946), p. 588.

⁹ *Etienne v. Gouvernement des Pays-Bas*, Oct. 31, 1947, Commercial Tribunal of La Rochelle, *Revue critique de droit international privé*, Vol. 37 (1948), p. 118.

In cases involving state immunity, the French courts have consistently held that Art. 14 of the *Code civil*, permitting French citizens to bring suit in French tribunals against resident and non-resident foreigners, was not intended to apply to suits against foreign governments. The *travaux préparatoires*, however, show clearly that there was no intention to deny such immunity, which, therefore, rests solely upon a principle of customary international law. See annotation to the above case by Ph. Francescakis, *ibid.*, pp. 119-123.

¹⁰ April 6, 1948, *ibid.*, p. 311. This case likewise contains no reference to the new Constitution. See also *Artel v. Seymand*, Feb. 19, 1948, Court of Cassation (*Ch. civ.*),

There are, however, cases in which the principle or rule of international law invoked before the tribunal may require definition or supplementation by internal legislation before it is susceptible of judicial application. It may be that the international norm fails to designate the state authorities or individuals who are its addressees, or that performance of the obligations or guarantee of the rights which it accords requires some positive legislative act. This situation is not peculiar to France, but is to be found wherever a rule of international law, whether customary or conventional, is not, according to the local law, "self-executing."¹¹ Rules of internal law which purport to be declaratory of international law, or which are designed to implement it internally, will naturally be resorted to whenever possible, since they indicate the legislator's conception of the measure of the international obligations of the state.¹²

It is possible, moreover, that a legislative or executive act may be in overt conflict with a recognized rule of international law. Confronted with such a contrariety, a French tribunal doubtlessly would give effect to the internal source. This situation, which has not been modified by the pledge contained in the new Constitution, may be explained by the simple fact that the power to review the regularity of legislation as to its conformity with international law has never been granted to the French tribunals either by a constitutional or legislative text, or by a customary constitutional rule. Since the power of judicial review or *contrôle juridictionnel* is contrary to French traditions of the "*souveraineté de la loi*," it would require far more

ibid., p. 477, in which it was held, by application of the rule of customary law with regard to the effect of war on treaties, that the outbreak of war with Italy in 1940 had rendered "*de plein droit caduques*" the reciprocal obligations assumed in the Treaty of June 3, 1930. J.-P. Niboyet, *ibid.*, p. 485, points out that whereas Art. 28 of the Constitution provides for the denunciation of treaties (in certain cases, with the authorization of the National Assembly), the issue in the present case turned on the customary international law of treaties, which determines the effect of war upon their international validity, and, therefore, upon their internal validity as well.

The simple and speedy procedure of "*annulation pour excès de pouvoir*" is employed for the purpose of setting aside judgments in disregard of the customary principle of state immunity. Thus, in the *Hanukiew* case, Jan. 23, 1933, the Court of Cassation (*Ch. req.*), Sirey, *Rec. gén.* (1933), Pt. I, p. 249, annulled a decision of the Civil Tribunal of the Seine giving judgment by default, "in violation of the fundamental principle of the reciprocal independence of states," against the Government of Afghanistan in a suit arising out of a contract for the supplying of arms and the granting of credit.

¹¹ This problem has received little attention from French jurists, insofar as it relates to obligations arising from customary international law, but has been developed more fully with regard to treaties. It is clearly stated by Paul Guggenheim, who points out that international law, as an "*ergänzungsbedürftige Rechtsordnung*," frequently requires supplementary legislation before it can be given internal effect. This, however, is not to be viewed as a "*Transformation*" of the international norm, but as a "*Konkretisierungsphase im völkerrechtlichen Rechtserzeugungsverfahren*." *Lehrbuch des Völkerrechts*, Vol. I (Basel, 1947), pp. 4-6, 32-34, 37-38.

¹² See Rousseau, *op. cit.*, pp. 846-853.

explicit language than that of the present text to justify the conclusion that such a grant of power was intended by the constituent authority of 1946.¹³ In practice, the possibility of a conflict between customary international law and a legislative act is limited, although not eliminated, through the adoption by the French tribunals of the apparently universal rule that internal law must be construed with the presumption that the legislator does not intend to violate international obligations.¹⁴

That the Constitution of 1946 fails to give to general international law the primacy it accords to treaties is probably due to the fact that the latter prescribe obligations which are relatively precise; that they become binding only with the consent of France; that they can be interpreted (with conclusive effect for both the judicial and the administrative tribunals) by the executive; and, finally, that they can be denounced. In the domain of customary international law it was apparently considered sufficient expressly to affirm the intention to conform to international obligations, and, implicitly, to confirm the existing right and duty of the tribunals to apply the rules of international law within the limits set by internal law. This sphere of judicial action, itself the product of a principle of customary constitutional law, will remain, as before, subject to restriction by legislative acts designed to concretize, to supplement, or even to violate, international

¹³ At one time during the drafting of the Constitution the provision which ultimately became Par. 14 of the Preamble was included under the title relating to "Sovereignty." It was there placed in order to avoid any possible implication that it might furnish the basis for judicial control of the constitutionality of laws alleged to contravene international law. A proposed amendment for establishing judicial review of legislation was later decisively rejected. *Assemblée nationale constituante (Elue le 3 juin 1946); Séances de la Commission de la Constitution: Comptes rendus analytiques* (Paris, 1946), pp. 126, 344. It is also clear that Par. 14 cannot be invoked in support of the procedure of "pseudo-control" of constitutionality provided by Arts. 91-93. Control of the conformity of internal law with international law must, therefore, be political, and not judicial, through posing of the *question préalable* before the National Assembly. See Robert Pelloux, "Le Préambule de la Constitution du 27 octobre 1946," *Revue du droit public et de la science politique*, Vol. 63 (1947), pp. 390-396.

¹⁴ See, for example, *Geoffroy et Delore v. Compagnie d'assurances maritimes "La Bulgaria"*, April 20, 1916, Court of Appeal of Paris, Sirey, *Rec. gén.* (1920), Pt. II, p. 17, in which it was held that decrees of 1914 and 1915 prohibiting "commercial relations" with enemy nationals should not be so construed as to prevent the latter from defending an action before the French courts. "Generally speaking," the court stated, "the right to appear in court is one of the natural rights, i.e., rights derived from the *droit des gens* which the foreigner enjoys in France, independently of any express provision of the law or of any international treaty. . . ." Furthermore, this right was guaranteed by Art. 23 h of the Annex to the Fourth Hague Convention of 1907, which, although not in force, was binding as an authoritative declaration of customary international law. Therefore, the court concluded, "in interpreting a new text one must always take into consideration existing laws and general legal principles, which remain applicable unless they have been modified and restricted in precise terms; a decree, enacted under exceptional circumstances, which derogates from these principles, must be applied *stricto sensu*, and care must be taken not to enlarge its terms or to extend its consequences. . . ."

norms. The failure of the new Constitution to follow foreign models which incorporated international law as an "integral part" of the law of the land is due, not to any notion that the observance of international obligations remains "*une fonction de la souveraineté*,"¹⁵ but to the fact that there was no need to render more explicit a legal situation that was never in doubt. It was not essential in France, as it was in Germany in 1919 and in 1949,¹⁶ to emphasize that the general rules of international law create direct and immediate obligations for the organs of the state and for individuals, so long as the legislator has not otherwise determined.

In turning to an examination of the constitutional provisions which concern the relations between conventional international law and internal law, it may seem that firmer ground has been reached. The provisions are more detailed than those which relate to the customary law; the methods of ratification and publication are specified; and the relative validity of the two legal sources is determined. Uncertainties, however, remain, and in the interpretation of these provisions it is essential to keep in mind, not only the innovations which have been introduced, but also the elements drawn from prior practice which must be regarded as tacitly incorporated in the new texts.

The relevant provisions are as follows:

Article 26. Diplomatic treaties duly ratified and published shall have the force of law even when they are contrary to internal French legislation; they shall require for their application no legislative acts other than those necessary to ensure their ratification.

Article 27. Treaties relative to international organization, peace treaties, commercial treaties, treaties that involve national finances, treaties relative to the personal status and property rights of French citizens abroad, and those that modify French internal legislation, as well as those that involve the cession, exchange or addition of territories shall not become final until they have been ratified by [virtue of] a legislative act.¹⁷

¹⁵ J. Donnedieu de Vabres, *op. cit.*, pp. 5-6.

¹⁶ See the writer's "International Law in the Constitutions of the Länder in the American Zone in Germany," this JOURNAL, Vol. 41 (1947), pp. 888-899, for a discussion of dualist influences in the drafting and interpretation of Art. 4 of the Weimar Constitution of Aug. 11, 1919. Compare Art. 25, Basic Law for the Federal Republic of Germany ("Bonn Constitution"), May 23, 1949. Germany, 1947-1949: The Story in Documents (Dept. of State Publication 3356, European and British Commonwealth Series 9, 1950), p. 286.

¹⁷ The bracketed words are inserted in order to supply an omission, which amounts to a mistranslation, in the text above quoted. The concluding phrase of the French text reads: "*. . . ne sont définitifs qu'après avoir été ratifiés en vertu d'une loi.*" The National Assembly, which possesses sole legislative power (Art. 13), does not *ratify* treaties; it merely authorizes their ratification in the cases specified in Art. 27. The President alone "*signe et ratifie les traités* (Art. 31)," a power which applies to all treaties, whether or not their ratification requires prior legislative authorization. The above English text, now given wide currency in Peaslee, *Constitutions of the Nations*,

No cession, no exchange and no addition of territory shall be valid without the consent of the populations concerned.

Article 28. Since diplomatic treaties duly ratified and published have superior authority to that of French internal legislation, their provisions shall not be abrogated, modified or suspended without previous formal denunciation through diplomatic channels. Whenever a treaty such as those mentioned in Article 27 is concerned, such denunciation must be approved by the National Assembly, except in the case of commercial treaties.

The formal requirement of Article 26 that treaties, in order to acquire the force of law, must be "duly (*régulièrement*) ratified," refers to a condition of their validity on both the international and internal planes. From the point of view of international law, ratification is the attestation by a competent organ that the will of the state has been constitutionally formulated.¹⁸ From the point of view of French law, it is an administra-

Vol. II, p. 12, is all the more misleading, since several earlier constitutions provided expressly for legislative ratification. See the Constitution of Sept. 3-4, 1791, Ch. IV, Sec. III, Article 3; and the *Constitution du 5 fructidor an III*, Art. 333, Duguit and Monnier, *Les constitutions et les principales lois politiques de la France depuis 1789* (6th ed., Paris, 1943), pp. 221, 300.

¹⁸ In French doctrine there is general agreement that the international competence of state authorities to conclude treaties is determined by internal law, and that the international validity of a treaty is, therefore, dependent upon its "regularity" or constitutionality. See, for example, Pierre Chailley, *La nature juridique des traités internationaux selon le droit contemporain* (Paris, 1932), pp. 167-236; Achille Mestre, "*Les traités et le droit interne*," *Recueil des Cours, Académie de Droit Int.*, Vol. 38 (1931-IV), pp. 241-248; and Ch. Rousseau, *op. cit.*, pp. 235-248. Cf. Jules Basdevant, "*La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités*," *Recueil des Cours, Académie de Droit Int.*, Vol. 15 (1926-V), pp. 577-582. See, in general, the Harvard Research Draft on the Law of Treaties, Art. 21 and Comment, this JOURNAL, Supp., Vol. 29 (1935), pp. 992-1009; and Paul De Visscher, *De la conclusion des traités internationaux* (Brussels, 1948), pp. 131-287.

In internal law, a distinction must be drawn between "extrinsic unconstitutionality" resulting from non-observance of the constitutional forms required for the conclusion of treaties, and "intrinsic unconstitutionality" resulting from contradictions in the content of the treaty with substantive provisions of the constitution. Chailley, *op. cit.*, p. 240. Thus, for example, the Court of Appeal of Colmar refused to apply a treaty on the former ground, in holding that a convention, "not having been approved by Parliament, could not, therefore, be ratified and promulgated, and cannot be invoked by the defendants. . . ." *Établissements Coulleres v. Matson Stein*, July 29, 1925, *Journal du droit int. privé*, Vol. 53 (1926), p. 604. Cf. cases cited by Rousseau, *op. cit.*, p. 242. Mestre, *op. cit.*, pp. 247-248, while acknowledging that French judicial courts did not, under the Third Republic, possess the power to control the intrinsic constitutionality of laws, maintains that they had the power to control the extrinsic constitutionality of both laws and treaties. The administrative courts, which considered ratification to be an "*acte de gouvernement*," held themselves incompetent to control their constitutionality on either ground. See *Aff. Caraco*, Council of State (Feb. 5, 1926), Dalloz, *Recueil périodique et critique de jurisprudence* (1927), Pt. III, p. 1.

tive act performed in the exercise of a discretionary competence conferred upon the President of the Republic by the Constitution. Even where treaties require approval by the National Assembly, the President retains full discretion as to whether he shall proceed to ratification, to the exchange or deposit of ratifications, and, further, to such steps as may be essential to ensure their full internal effect.¹⁹ Legislative approval, although a *condicio juris* for treaties of the types specified in Article 27, merely constitutes an authorization, and does not have the effect of transforming the treaty itself into a law.²⁰

When a treaty has been validly concluded, according to the forms prescribed both by international law and constitutional law, there arises an obligation for the parties to take such further steps as may be required by their constitutional processes to give practical effect to its provisions. In French practice this obligation has traditionally been carried out by means of a presidential decree promulgating the treaty and thereby making it executory or internally enforceable. During the period of the Third Republic, the juridical nature and effect of the act of promulgation was the subject of continuous controversy. Some saw in it a "reception," which, by a sort of novation, transformed the international norm into one of internal law. Promulgation, according to this view, introduced into the legal system a rule which, without this formality, would have solely the force of a contractual agreement between states.²¹ To others, promulgation was de-

It seems reasonably clear that this situation has undergone no change with the adoption of the new Constitution, and that the language of Art. 26 is intended to confirm the power of the judicial courts to exercise control over the extrinsic constitutionality of treaties.

¹⁹ " . . . The intervention of the legislative power has no object other than to authorize the President to ratify these treaties and to render them executory (*exécutoires*) by promulgating them; it does not diminish at all his powers, and he may or may not use this legislative authorization to ratify and promulgate them, according to circumstances. . . ." *Renault et Société des Usines Renault v. Société Rousski Renault*, Jan. 28, 1926, Court of Appeal of Paris, Sirey, *Rec. gén.* (1927), Pt. II, p. 1 (with annotation by J.-P. Niboyet).

In this respect, the Constitution of 1946 introduces no innovation. See, for example, the formula employed in the law of authorization, July 10, 1948, relating to the agreement concluded between France and the United States on June 28, 1948, *Journal officiel*, July 11, 1948; *Rev. crit. de droit int. privé*, Vol. 37 (1948), p. 327.

²⁰ "It has sometimes been said—and this is indisputably an error—that since the Parliament has, by a law, authorized the President to ratify a treaty, the latter is itself a law; but this is to confound *une formalité purement habilitante* with the act which is performed subsequent to this authorization. . . . Furthermore, the President of the Republic is not obliged, even by virtue of this law, to ratify the treaty. . . . Consequently, the law cannot put the treaty into force; it is, therefore, an error to say that *the treaty is a law*." J.-P. Niboyet, *Cours de droit international privé* (Paris, 1946), p. 40.

²¹ Paul Duez, *De l'indépendance des autorités législatives et des autorités réglementaires dans la fixation des règles de droit* (Lille, 1914), pp. 407 ff. Also Masters, *op. cit.*, pp. 134-136.

void of legal effect; it was a mere "birth certificate" which added nothing to the validity or to the content of the treaty, which, by ratification alone, became both obligatory and executory.²² The more general view was that "the veritable object of promulgation is not to create new law, but simply to certify the regularity of pre-existing law with a view to permitting its execution by the public agents included within the internal administrative and judicial hierarchy."²³ As in the case of a law, a treaty was "*obligatory*, by virtue of its regular conclusion; *executory*, by virtue of its promulgation; and *applicable*, by virtue of its publication. . . ."²⁴

According to the general formula employed by the French tribunals prior to 1946, "diplomatic treaties, duly promulgated in France, have the force of law, and, as such, must be applied by the judicial authority . . .";²⁵ in the absence of such promulgation, it was frequently stated, the treaty could not be applied.²⁶ The theory according to which the act of promulgation was the source of the internal legal obligation of treaties was unable, however, to account for the fact that governmental agents, including the courts, regularly gave effect to certain types of international agreements which were not the objects of formal promulgation. "Force of law" was given to "*accords en forme simplifiée*," such as exchanges of letters,²⁷ and notably to the Armistice Conventions of November 11, 1918, and of June 22 and 24, 1940, which were neither promulgated nor officially published.²⁸

Article 26 of the Constitution of 1946 terminates an ancient controversy by suppressing the formality of promulgation. Henceforth, ratification,

²² Georges Scelle, *Précis de droit des gens*, Vol. II (Paris, 1934), pp. 352-354, and *Préface* to J. de Soto, *La promulgation des traités* (Paris, 1945), pp. 1-7.

²³ Rousseau, *op. cit.*, p. 401.

²⁴ Chailley, *op. cit.*, p. 249, and, generally, pp. 247-260. Promulgation, according to Chailley, "declares (*constate*) that the procedure for the conclusion of the treaty having been duly followed, the treaty applies directly within the state. . . . It addresses to the agents of the state the order to *cause the treaty to be observed*; it does not confer upon the treaty its juridically obligatory force, but presupposes it." *Ibid.*, p. 257. Also, Mestre, *op. cit.*, pp. 261-262.

²⁵ *Bigelow v. Princesse Zislanoff*, Dec. 15, 1928, Court of Cassation (*Ch. crim.*), *Rev. de droit int. privé*, Vol. 24 (1929), p. 77; and cases collected in Rousseau, *op. cit.*, pp. 396-398.

²⁶ See, for example, *Aff. Jauge, Tassin et autres*, Nov. 28, 1834, Court of Cassation (*Ch. civ.*), Sirey, *Rec. gén.* (1834), Pt. I, p. 822.

²⁷ Rousseau, *op. cit.*, pp. 260-261, 401-404; de Soto, *op. cit.*, pp. 89-103; Chailley, *op. cit.*, pp. 252-257.

²⁸ See, for example, *W . . . et M . . . v. l'Etat*, Feb. 4, 1920, Superior Tribunal of Colmar, Sirey, *Rec. gén.* (1922), Pt. II, p. 57; *L . . . v. Dame L . . .*, June 19, 1941, Civil Tribunal of Senlis, *Gazette du Palais* (1941-II), p. 81. See cases cited by Jules Basdevant, "*Le rôle du juge national dans l'interprétation des traités internationaux*," *Rev. crit. de droit int. privé*, Vol. 38 (1949), pp. 417-419, who draws from them the conclusion that the courts "apply the treaty and not merely the decree of promulgation. . . ."

accompanied by an exchange or deposit of ratifications, suffices to attest the regularity of the treaty as a source of legal obligation on both the international and internal planes.²⁹ Publication brings it to the knowledge of private citizens, and, as before, fixes the point of time at which arises their obligation to conform to its provisions, and their right to invoke it before the courts and other organs of the state.³⁰ This innovation will be variously interpreted: to some it will appear to constitute a merging of promulgation with publication; to others it will confirm the monist view that a duly ratified treaty, as a valid international obligation, becomes, without any further act which can reasonably be construed as "reception," an integral part of French law.³¹

In providing that treaties which are duly ratified and published shall have the "force of law," Article 26 adopts a traditional formula which is roughly descriptive of the position of treaties within the French legal system. Although it is merely a metaphorical expression,³² it indicates that a treaty constitutes an autonomous source of law (*droit*) analogous to a law (*loi*); that it is for certain purposes assimilable to a law; and that it is directly applicable (when self-executing) by the organs of the state, including the judiciary. A convenient metaphor, however, cannot suffice to transform a treaty into a law, and the traditional formula, if understood liter-

²⁹ See, for example, the formula employed in the decree of Dec. 22, 1948, ordering the publication and execution of an agreement between France and Italy relating to the settlement of certain private claims, *Journal officiel* (1948), p. 12436; *Rev. crit. de droit int. privé*, Vol. 38 (1949), p. 148:

Le Président de la République,
Vu les articles 26, 27 et 31 de la Constitution;
Vu la loi no. 48-1481 du 25 septembre 1948 [the law of authorization];
Décrète:

Art. 1er.—Un accord ayant été signé, le 29 novembre 1947, entre la France et l'Italie au sujet de l'application de l'article 79 du traité de paix avec l'Italie, ledit accord sera publié au Journal officiel de la République française: . . . [Here follows the text of the agreement.]

Art. 2.—Le président du conseil des ministres, Ministre des Finances et des affaires économiques . . . [and other ministers] sont chargés chacun en ce qui le concerne, de l'exécution du présent décret.

³⁰ On the effect of publication, see de Soto, *op. cit.*, pp. 86-87. Cf. Art. 1, *Code civil*: "Laws are executory within the whole of French territory by virtue of their promulgation. . . . They shall be executed [that is, applied] from the moment their promulgation can be known [through publication]." See Ch. Beudant, *Cours de droit civil français* (2d ed., Paris, 1934), pp. 131 ff.

³¹ See Michel Mouskhély, "Le traité et la loi dans le système constitutionnel français de 1946," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 13 (1950), pp. 109-112. In maintaining that Art. 26 adopts the most important consequences of the monist position, Mouskhély assumes—incorrectly it is believed—that the prior practice confirmed the dualist view.

³² See Chailley, *op. cit.*, pp. 330-331; J. Donnedieu de Vabres, *op. cit.*, p. 6.

ally, leads to a misconception of the essential function of the tribunals in the interpretation and application of treaties.³³

The final clause of Article 26 provides that treaties "shall require for their application no legislative acts other than those necessary to ensure their ratification," a provision which refers to the requirement of Article 27 that treaties relative to the subjects therein listed may be ratified and put into force only after legislative authorization.³⁴ All treaties, whether ratified by the President alone, or with the prior approval of the National Assembly, are integrated by Article 26 directly into the internal legal system and given "force of law."³⁵ The Report of the Constitutional Commission of 1946 declared:

³³ The rôle of the judiciary, Mestre has emphasized, is not confined to ensuring the application of the laws (*lois*); their broader function is "to say the law (*droit*)."³³ But, he continues, "the law, in its totality, constitutes a very complex and vast ensemble of which the legislative enactment is an essential element, but which comprises in addition all that Hauriou calls the '*bloc de légalité*.'" The latter includes not only the law [statute], but also numerous other written documents, such as regulations, administrative acts of every kind, international treaties, contracts concluded by individuals, and judicial decisions. To this mass of written sources, it is necessary to add customs; the rules of equity, occasionally; and, in certain cases, even foreign laws. One perceives, therefore, how current expressions, such as '*application de la loi*,' '*force de loi*,' are too narrow to encompass the much more comprehensive mission of jurisprudence." *Op. cit.*, p. 264.

³⁴ The list contained in Art. 27 is based on that contained in Art. 8 of the Constitutional Law of July 16, 1875, which, in turn, is based on Art. 68 of the Belgian Constitution of Feb. 7, 1831. See De Visscher, *op. cit.*, pp. 42, 56. To the earlier list it adds the requirement that legislative authorization be given for treaties relative to international organization and treaties which modify French internal legislation. It further requires that territorial changes be approved by plebiscite as well as by legislative act.

For an analysis of the provisions of Art. 8 (applicable, *mutatis mutandis*, to Art. 27), see Rousseau, *op. cit.*, pp. 223-232, where it is pointed out that some of the most important treaties, such as political treaties, treaties of alliance, of protection, and of arbitration and non-aggression, escaped (as they do still under the Constitution of 1946) from the constitutional requirement of prior legislative authorization. As a matter of political expediency, there was a tendency under the Third Republic to submit all important treaties to parliamentary approval, even where this was not constitutionally required—a tendency which will presumably continue under the Fourth Republic. "*Conventions d'union*," such as the Universal Postal Convention of Nov. 30, 1920, were regularly submitted for parliamentary approval. *Ibid.*, pp. 232-234; also, De Visscher, *op. cit.*, pp. 58-62. The additional requirement of Art. 27 with regard to treaties concerning international organization, therefore, merely gives formal constitutional status to an established customary practice.

³⁵ Since legislative authorization takes the form of a law, it is given by the National Assembly alone (Art. 13). All acts performed by the President of the Republic in connection with treaties are subject to countersignature by the President of the Council of Ministers and by a Minister (Art. 88), under responsibility of the Council of Ministers to the National Assembly (Art. 48).

A treaty must necessarily prevail and suffice in itself. It is therefore unnecessary to modify the law in advance with a view to ensuring the possible application of the treaty. The tacit abrogation, or, at least, the neutralization of the provisions contrary to the treaty is effected *de plein droit*.³⁶

The above clause must, however, be read with the tacit proviso that it shall refer only to treaties which are self-executing. Some treaties are susceptible of immediate application by executive decree, if they fall within the "*compétence réglementaire*"; others may establish new rules of law which are applicable without further legislative action by the administrative and judicial authorities, as, for example, those relative to the acquisition of nationality, or to the status of resident aliens. But in yet other cases, the obligations imposed by the treaty are such that some positive exercise of the legislative power, subsequent to the entry of the treaty into force internationally, may be required before they can be given internal effect. Even where legislative authorization has been given in conformity with the requirement of Article 27, a further law of execution may be essential, as, for example, in cases where a treaty imposes the obligation to make an appropriation, to establish a penalty, or to organize a new governmental service.³⁷ Whether such legislation is requisite in any particular case can be determined only by reference to the relevant rules of positive law. The method by which the provisions of a treaty are given internal effect is, in France, as in other countries, a matter of "*aménagement pratique*" rather than an exigency of juridical logic based upon the premises of dualist theory.³⁸ The effect of the provisions of Articles 26 and 27 is to integrate treaties directly into the internal legal system to the greatest extent possible; they cannot apply to treaties which, by the nature of the obligations imposed, are non-self-executing.

The provision of Article 26 that treaties shall form an integral part of the law even when they are contrary to internal legislation clarifies a situation concerning which there had previously been some uncertainty. Read in connection with the requirement of Article 27 that treaties which modify prior legislation must receive the approval of the National Assembly, it represents a very slight change in the earlier situation with regard to the relative force of legislation and subsequent treaties. Although the Constitutional Law of July 16, 1875, had required such approval only for treaties

³⁶ Quoted by Mouskhély, *op. cit.*, pp. 110-111.

³⁷ See Niboyet, "*La législation des loyers en France: le droit constitutionnel et le droit international*," *Rev. de droit int. privé*, Vol. 24 (1929), p. 59; Mestre, *op. cit.*, pp. 254-255. Basdevant, *op. cit.*, pp. 416-419, observes that the situations in which special legislation is required in order to give internal effect to treaties are, in France, rare and exceptional. In some instances, "these derogations from the habitual practice cannot very well be explained, unless by faulty methods or by a sort of administrative disorder, of which there are examples in all countries."

³⁸ Rousseau, *op. cit.*, p. 392.

relating to the subjects therein listed, there had developed a practice of submitting virtually all treaties of an important character or affecting prior legislation for approval by the Chambers. The additional requirement of Article 27, which renders practically superfluous the heterogeneous enumeration carried over from the earlier constitutional law, is a logical application of the doctrine of the separation of powers, which, as generally construed in France, would be violated if the executive were authorized on its own authority to modify the expression of "the affirmative will of the national sovereignty" contained in a law.³⁹

Although the subject had not been regulated by a formal text before the adoption of the new Constitution, it was universally accepted that a treaty, at least when approved by the Chambers, became an integral part of French law, and, if self-executing, superseded or "neutralized" contrary provisions of existing legislation.⁴⁰ The courts were divided, however, on the question whether treaties which dealt with subjects outside the enumerated list, and which, therefore, could be ratified by Presidential decree alone, had such an effect.⁴¹ The controversy is now settled by the express terms of Article 26, which gives superiority over contrary legislation to such treaties as have received the approval of the National Assembly.⁴² Treaties

³⁹ See Niboyet, in *Recueil Dalloz . . . hebdomadaire* (1946), *Chronique XXIII*, p. 89.

⁴⁰ Among the more recent cases, see, for example, *De Rasmy et Tanner v. Martin et Berger*, May 11, 1927, Court of Cassation (*Ch. civ.*), *Journal de droit int.*, Vol. 55 (1928), p. 378; *Pick v. Bernheim*, Feb. 5, 1936, Court of Cassation (*Ch. req.*), *Sirey, Rec. gén.* (1936), Pt. I, p. 151; and *Société dite Gasoline Products Company Inc. v. La Raffinerie des Pétroles nord et la Société dite A. Borsig G.M.B.H.*, Feb. 12, 1941, Court of Cassation (*Ch. req.*), *Sirey, Rec. gén.* (1942), Pt. I, p. 44.

In *Kalmanovitch v. Southern Railway Compagnie Internationale des Wagons-Lits*, Nov. 10, 1938, *Rev. crit. de droit int. privé*, Vol. 34 (1939), p. 186, the Civil Tribunal of the Seine held that an agreement concluded between France and Great Britain in 1933 prevailed over the rule contained in Art. 59, *Code de procédure civile*. Its opinion was expressed in terms which implied the superiority of the provisions over subsequent legislation as well: "International conventions and tariffs have the character of rules of international public order, which are superior to the provisions of the internal law of the signatory states, and create between their nationals juridical obligations which must be respected and executed. . . ."

Strictly speaking, a treaty does not "abrogate" or "repeal" a contrary law. It merely "neutralizes" or "paralyzes" the execution of the law for the time that it is in force, and with respect to the relations which it governs. When it is terminated, the law recovers its full application. Chailley, *Traité international (Théorie générale des)*, *Répertoire de droit international*, Supp. (Paris, 1934), p. 344; Mestre, *op. cit.*, pp. 252-253, 275, 285.

⁴¹ See, for example, the decision of the Court of Appeal of Douai, in the case of *Six et Cie "La Zurich" v. Opsomer* (March 2, 1926), *Journal de droit int.*, Vol. 54 (1927), p. 119, in which it was stated that "a convention promulgated by a simple decree cannot modify the law . . . ; if a diplomatic convention may prevent the operation of a legislative provision this is only on the condition that this convention has received the approval of Parliament." See the cases collected by Rousseau, *op. cit.*, pp. 420-421.

⁴² See *CapeHo v. Marie*, Feb. 10, 1948, *Rev. crit. de droit int. privé*, Vol. 37 (1948), p. 491, in which the Court of Cassation (*Ch. civ.*), annulled a judgment of the court be-

ratified by the President in conformity with the terms of Article 31 have also the force of law and are directly applicable, even when they pertain to matters within the legislative domain, provided that they do not positively conflict with existing legislation.⁴³

While it was agreed, even before 1946, that a treaty approved by the Chambers prevailed over a contrary prior law, there was the widest divergence of views as to the juridical basis for this superiority. The problem offered no difficulty for those who considered that a treaty operated in the internal legal order as a *loi*.⁴⁴ By applying the maxim *lex posterior derogat*

low on the ground that it had misinterpreted a treaty concluded in 1930 as not having been intended to accord to the appellant rights claimed under that treaty, and denied to him by legislation enacted in 1926. The Court stated: "... The judges below are bound to apply literally, and without power to modify them under any pretext whatever, clear and precise international conventions which do not necessitate any interpretation, and whose authority is superior to that of internal common law. . . . The judges below are not competent to interpose French common law, which is deprived of authority when opposed to the clear provisions of a treaty. . . ."

⁴³ The Constitution of 1946 has not altogether resolved the difficult legal problems resulting from the conclusion of informal agreements by procedures other than those prescribed for "diplomatic treaties." See, for example, the decision of the Court of Appeal of Paris, in the case of *Colman* (Dec. 5, 1947), *Rev. crit. de droit int. privé*, Vol. 36 (1947), p. 435, by which a Belgian national, condemned to death for intelligence with the enemy and for bearing arms against his country, was held to be extraditable. As a political offender, he was not extraditable under the Franco-Belgian Convention of Aug. 15, 1874, or the French Law of March 10, 1927. The court held, however, that he could be extradited by application of the terms of an exchange of letters between the French and Belgian governments, Dec. 17, 1946, and Jan. 10, 1947, which provided for the reciprocal surrender of persons for offenses against the internal security of the state committed in the course of a war against a common enemy. The court held that the agreement supplemented the earlier treaty; that the Law of 1927 was inapplicable, except on points not covered by international agreement; and that Art. 26 of the Constitution was "confined to giving predominance over internal French laws to treaties regularly ratified and published, without prohibiting the Government from concluding such a particular agreement [as that contained in the exchange of letters], whether published or kept secret, in matters for which it is qualified to act alone. . . ."

This ruling has been settled by a number of decisions handed down in the period 1945-1947. See *contra*, however, the decision of the Court of Appeal of Paris in the case of *Talbot*, March 18, 1947, *Gazette du Palais* (1947-II), p. 17, in which a demand for extradition was rejected, the court holding that the above-cited exchange of letters could not have "in default of justification, of ratification and of publication, *force de loi*, in the terms of Art. 26 of the Constitution." See the note by H. Donnedieu de Vabres, *Rev. crit. de droit int. privé*, Vol. 36 (1947), pp. 439-440, who maintains that the Law of 1927 and formal treaties were intended to furnish an exclusive regulation in matters of extradition, and that: "It is to diplomatic treaties alone, regularly ratified and published, that Article 26 of the Constitution attaches an authority superior to that of the law. *A fortiori*, a simple agreement, devoid of form, between the representatives of the executive power of the interested states, could not set aside a traditional principle formally consecrated by the Franco-Belgian Convention and by the laws of the two states: that of the non-extradition of political offenders."

⁴⁴ "In applying a later treaty derogating from a prior law, the judge is, in fact, obeying the principle of positive law by virtue of which a later internal rule derogates

priori the courts necessarily gave preference to the treaty over the earlier law in the event of incompatibility between their terms. It resulted logically from this postulate, however, that a treaty, having only the force of law, could be abrogated, or, more exactly, be deprived of internal effect, by subsequent legislation. This solution, which was applied in numerous decisions and which doubtlessly reflected the dominant trend, was expressed with exceptional clarity in the case of *Vicens v. Bonfillou*, in which the court found that there existed an evident and irreconcilable contradiction between the terms of a law and a prior treaty. The court stated:

. . . In the presence of such a contradiction the task of the judge is to determine whether the law, of which he must always be the scrupulous guardian, implies with certainty the will of the legislator to prevent the application of a regularly-concluded treaty. . . .

It is the general rule that "every legislative provision must always be considered as reserving the application of treaties which may be contrary thereto, unless it has been expressly proved that the legislator has himself otherwise decided. . . ." Although the law in question was silent as to the reservation of rights derived from prior treaties, an examination of the *travaux préparatoires* clearly revealed the intention of the legislator to derogate from the terms of the treaty, or, at least, to create a special right reserved exclusively to French citizens, irrespective of the terms of any treaty. The court concluded:

. . . In the face of this contradiction between the treaty and the law, it must be decided that force shall be given solely to the latter; the judge, who is bound to apply the law, cannot be permitted to infringe upon it under any pretext, whatever may be the seriousness of the consequences, even of an international character, which may result. . . .⁴⁵

The application of a law in derogation of a treaty did not necessarily imply, however, that the judge deemed the treaty to have, by its nature, an inferior legal force; nor did it involve any denial that such application would engage the international responsibility of the state. The positive solution adopted prior to 1946 does not justify the conclusion that the courts considered that the two sources were in conflict upon an equal plane,

from an earlier internal rule. The conflict exists only between two sources of internal law, and not between the internal and the international legal order." Kopelmanas, in *Recueil général périodique et critique des décisions . . . relatives au droit international* (1936), Pt. III, p. 88.

"Once it has entered into the French legal system a treaty loses its character as an international norm and becomes a simple rule of French law." André Gros, in *Grotius Society: Transactions for the Year 1944*, Vol. 30 (1945), p. 40.

⁴⁵ Court of Appeal of Dijon, May 2, 1933, *Rev. de droit int. privé*, Vol. 28 (1933), p. 480; also *Tissot v. Veuve Isabelle*, May 24, 1933, Civil Tribunal of Le Havre, *ibid.*, p. 478; *Spilka v. Lerche*, June 30, 1932, Court of Cassation (*Ch. civ.*), *ibid.*, p. 475; and cases collected by Rousseau, *op. cit.*, pp. 422-423.

or that they had adopted either the doctrine of dualism or of monism with primacy of internal law. From the viewpoint of the courts, the solution was determined, not by deductions drawn from the specific legal nature of either source, but from the limitations imposed by internal law upon the powers of the judiciary.⁴⁶ It resulted from a fundamental principle of French public law, which denied to the courts any power to control the constitutionality of laws, and, therefore, *a fortiori*, to control the conformity of laws with treaty obligations.⁴⁷

French judges and French jurists were, of course, aware that a judicial decision applying legislation contrary to an existing treaty constitutes no excuse for the non-fulfilment of an international obligation, but is the consummation of the initial wrong committed by the legislator. The latter, upon whom devolves the responsibility for maintaining the conformity of internal law with international obligation, has tended, in France, as elsewhere, to view all problems within his competence in the light of domestic policy. This attitude, in turn, has been encouraged by the tendency to envisage a treaty as equivalent to a law, and, therefore, as fully subject to the ultimate sovereignty of the nation whose will the legislator presumably expressed.⁴⁸ The result of this conception of the omnipotence of the legislator was especially manifest in the laws enacted during the inter-war period with the purpose of excluding aliens from benefits relating to commercial and agricultural property, claimed under treaties containing clauses assimilating the treatment of aliens to that of nationals, either directly, or indirectly through most-favored-nation clauses.⁴⁹ This legislation, adopted

⁴⁶ See Chailley, *La nature juridique des traités*, pp. 237-238.

⁴⁷ See Albert de la Pradelle, in *Rev. de droit int. privé*, Vol. 22 (1927), pp. 55-57; and J. Perroud, in *Journal de droit int.*, Vol. 55 (1928), pp. 1003-1004. That the solution was dictated by internal limitations upon the judicial power, and not by the relative legal hierarchical position of the treaty and the law, was implied in such a decision as that of the Civil Tribunal of the Seine, Oct. 27, 1926, *Rev. de droit int. privé*, Vol. 22 (1927), p. 44, in the case of *Chenouard v. Demoiselle Denis*, in which it was asserted that the precise terms of a law would "set aside" the inconsistent provisions of an earlier treaty, since "the judge is not authorized to examine the question as to whether or not the legislator . . . had, according to international law, the legislative competence essential to the international validity of the law; . . . as an internal organ, the judge cannot take cognizance of the law (*loi*) according to any criterion other than that of internal law (*droit interne*)."

This position, furthermore, is entirely compatible with the conception that a treaty is an "autonomous juridical form, distinct from a law" and operating upon a different plane; and that it continues to retain its validity, notwithstanding the fact that its application may be "paralyzed" by the enactment of a contrary law, observance of which is imposed upon the judge by a rule of internal public law. The treaty, in this situation, is merely "*écarté*," and regains its full efficacy upon repeal of the law. Mestre, *op. cit.*, pp. 252, 282-285.

⁴⁸ Niboyet, "*La séparation des pouvoirs et les traités diplomatiques*," *Mélanges R. Carré de Malberg* (Paris, 1933), pp. 402-403.

⁴⁹ The literature of this subject is voluminous. For a brief analysis of the principal issues, see Kopelmanas, in *Rec. gén. périodique* (1936), Pt. III, pp. 85-86.

without regard for possibly conflicting international obligations, compelled the executive, which was confronted with numerous international reclamations, to recall to both the Chambers and the courts the principle that "a diplomatic convention is the law of the two states that have concluded it," and that "each of them is responsible to the other for the correct application upon its territory of the stipulations therein contained."⁵⁰

The result of this executive intervention was to unsettle the hitherto generally accepted principle with regard to the relative internal effect of laws and treaties. It gave new encouragement to juristic doctrines of the supremacy of international law, and led to a line of decisions which not only espoused this view, but gave it practical effect through an assertion of the power of the courts to control legislation enacted in violation of treaty engagements. Amidst the uncertainties and conflicts of legal doctrine and judicial opinion, there developed a marked trend toward an increasing respect for the obligations of treaties, which received its consummation in the Constitution of 1946, Article 28 of which affirms that "diplomatic treaties duly ratified and published have superior authority to that of French internal legislation. . . ."

A brief discussion of the developments which led to this result is no mere digression in a discussion of the present legal situation, which is not without its controversial aspects, despite the seemingly clear and categorical terms of the constitutional text. Traditional legal conceptions, although contrary to the spirit and apparent purpose of the new text, continue to influence its interpretation, and may possibly, through the inertia of judicial conservatism, deprive it of much of the practical significance which it may at first glance seem to possess.

Whereas no very definite conclusions as to their theoretical juristic bases can be drawn from the judicial decisions which, prior to the adoption of the new Constitution, gave preference to a law in the event of conflict with a prior treaty, the exceptional decisions which continued to apply the treaty were necessarily inspired by some conception of the supremacy of the international legal order. Although formulated with slight regard for theoretical precision or clarity, they appear to have rested upon the premises of the monist view: that international treaty norms are applicable in the internal

⁵⁰ See the statement of M. Navailles-Labatut, on behalf of the Minister of Foreign Affairs, before the Chamber of Deputies, May 28, 1949, *Rev. de droit int. privé*, Vol. 24 (1929), pp. 699-704; also, Report to the President of the Republic by the Minister of Foreign Affairs, April 14, 1933, *ibid.*, Vol. 28 (1933), pp. 377-381. Out of deference to the Chambers, the Minister of Foreign Affairs placed the responsibility upon the courts for a misinterpretation of the legislative intent: "The formal will of the legislator is invoked [by the courts] in order to deny to aliens without distinction the benefit of the law concerning the rental of immovables. . . . But it is then necessary to suppose that the Chambers had the intention not to respect the conventions signed by France. One cannot, and one ought not, attribute such an intention to the French Parliament. If it had wished to breach . . . the international obligations of France, it would have so declared in the express terms of the law itself." *Ibid.*, p. 378.

sphere *per se*, and without any specific art of reception; that they are not transformed by this application, but retain their international character; and that they are not, therefore, subject to modification or abrogation by the legislative authority of a party. The justifications for these premises were diverse, although they may be narrowed down to two principal positions: (1) that a treaty, as a multilateral act, has "greater force" than a law, which is merely a unilateral declaration;⁵¹ and (2) that a treaty is a particular procedure for the creation of law, parallel to legislation; that it is valid at one and the same time as an international and an internal norm; and that it is terminable only by the same process as that by which it was created.⁵²

The influence of the former view is obvious in the statement of the Civil Tribunal of Colmar that the obligatory force of a treaty

ceases only by a regular denunciation, which, of necessity, results from the contractual character of this diplomatic act, and the conditions of which are ordinarily envisaged by the contracting parties; from this results a sort of preëminence of the treaty over the law. Consequently, if a posterior law contains provisions which are not in harmony with the treaty, it is the latter which must prevail over the said law. . . .⁵³

⁵¹ This view is generally associated with the name of J.-P. Niboyet, according to whom "The treaty and the law are on distinct and parallel planes, which do not meet. Each has its own source: the former is made for international *contractual* relations, and the latter for internal relations, and even for unilateral international relations. . . ." *Rev. de droit int. privé*, Vol. 28 (1933), p. 491. See also, *ibid.*, Vol. 24 (1929), pp. 592-609; *Manuel de droit international privé* (2d ed., Paris, 1928), p. 41; "Un pas appréciable vers le respect des traités," *Recueil Dallos . . . hebdomadaire* (1936), *Chronique*, pp. 41-42; and "La séparation des pouvoirs et les traités diplomatiques," *Mélanges R. Carré de Malberg* (Paris, 1933), pp. 399-415; *Traité de droit international privé français*, Vol. I (Paris, 1938), pp. 36-47.

⁵² Chailley has given the most thorough and original exposition of the doctrine of the "parallélisme des formes" and the "acte contraire," *La nature juridique des traités*, esp. pp. 109-130. A treaty, he asserts, is not a contract, but a special procedure for the creation of law (*droit*), envisaged by the constitutional law of the various countries, and parallel to the legislative procedure. "The norms resulting from this procedure are intended, as a result of their regular elaboration, to operate, directly and of themselves, at one and the same time as rules of internal law and international rules. . . ." *Ibid.*, p. 238. "Under the name of a treaty, the tribunals apply international norms which do not thereby lose their own proper character, even from the point of view of internal jurisdictions. Elaborated according to a certain procedure, they can only cease to be in force through a regular abrogation, that is to say, one which is carried out according to the same forms as those observed during their creation; consequently a posterior law cannot prevail over a treaty which is not abrogated by the authority competent in this respect [*principe de l'acte contraire*]." *Ibid.*, p. 320.

⁵³ *Weyl-Bloch v. Bigar*, Feb. 20, 1929, *Journal de droit int.*, Vol. 57 (1930), p. 127. Also, *Lucas-Moreno v. Banque commerciale africaine*, Dec. 12, 1927, Civil Tribunal of the Seine, *ibid.*, Vol. 55 (1928), p. 983; *Betsou v. Volszenlogel*, Dec. 23, 1927, Civil Tribunal of the Seine, *ibid.*, p. 999; *Garnier v. Allied Purchasing*, July 3, 1928, Civil Tribunal of the Seine, *ibid.*, Vol. 56 (1929), p. 391; *Leuba v. de Rocca-Sera*, April 25, 1929, Civil Tribunal of the Bouches-du-Rhône, *ibid.*, Vol. 57 (1930), p. 133; and *Hobier v. Sigg*

The decision of the Court of Appeal of Aix in the case of *S.C.N.F. v. Chavannes*, reveals no less clearly the influence of the latter view. In refusing to apply a law which would release the respondent from liabilities arising under the provisions of an earlier treaty, the court declared that

an international treaty binds the states parties to it until such time as they have withdrawn from it in conformity with the forms and requirements as to notice prescribed by the text itself; and one of the contracting parties cannot withdraw therefrom on its own initiative.⁵⁴

Such decisions as the above, which were contrary to the dominant trend, not only anticipated the solution which was ultimately incorporated in Article 28 of the new Constitution in proclaiming the internal supremacy of international treaty obligations, but also—again in opposition to current constitutional doctrine—asserted a right to decline the application of legislation which challenged this supremacy. Since the courts did not themselves furnish any explanation or legal justification for their assumption of this power, it is necessary to turn to the writers. Niboyet has supplied an especially forceful argument in support of the judicial guarantee of the supremacy of treaties, in denying the pertinence of the usual contention that the lack of judicial review of the constitutionality of laws implied a lack of power to control the competence of the legislator by reference to the standard of international law. He stated:

The judge, in a matter of a law modifying a treaty, does not have to decide as to a conflict between two successive laws, which would lead him to obey the more recent of the two, however evil or unjust it might be. He is in the presence of two texts, each having a distinct origin, and which are not capable of mutually destroying one another, in the sense that a law can stifle a treaty. Each has its own limited domain of application: the statute for the common law (*droit commun*), and the treaty for international relations. The only task for

Sandrinio et Compagnie d'Assurances "La Zurich," Oct. 21, 1936, Court of Appeal of Orléans, *Rec. gén. périodique* (1937), Pt. III, p. 1. In *Brard v. Chiesa*, Dec. 21, 1931, *Rev. de droit int. privé*, Vol. 27 (1932), p. 283, the Civil Tribunal of Angers evidently relied upon the principle of the *lex specialis*, in holding that: "... a treaty, in principle, is a veritable law which participates in the sovereignty of the law, and it may, therefore, derogate from the law, to the extent that its character as an international agreement implies; ... It does not have the character of generality of the law properly so called, and the rules which it sets forth are destined only to regulate the relations of the state and its individual citizens with the co-contracting state and its nationals; ... consequently, a state cannot, by its internal regulations, by a posterior internal law, lay down rules contrary to the provisions of the treaty, or modify the execution of the engagements which it has undertaken with regard to foreign powers, unless changes in internal legislation are envisaged in the treaty itself; ... thus, a conception that a diplomatic convention might be modified by the provisions of an internal law is directly contrary to the most certain rules of the law of nations, and is not acceptable on any ground. ..."

⁵⁴ Feb. 9, 1943, *Rev. crit. de droit int.*, Vol. 35 (1940-1946), p. 276 (annotation by Henri Battifol).

the judge is to demarcate these two domains. . . . To this it will be objected that the judge is bound to obey the law, that he is not competent to judge its constitutionality, this role not having been devolved upon him. . . . Why the law alone? Whence comes this omnipotence? The judge must apply the laws or the law (*droit*) in the broad sense of the term. In the presence of a law, on the one hand, and a treaty, on the other, he must obey the one *and* the other, because both are binding on him, but for different hypotheses. The treaty obligates the judge from the time that it is regularly ratified and published, and for so long as it has not been denounced. . . . In his application of the treaty, the judge does not encounter the law. . . . These are two forces which do not meet . . . they are not like a gear, but like two wheels revolving upon the same axis⁵⁵

Notwithstanding the contrariety of opinion among the lower courts concerning the relative internal efficacy of a treaty and a later law, the Court of Cassation did not, during the period under discussion, give any definite ruling on this problem, but evaded the difficulty by interpreting both in such a way as to reconcile their terms. This solution, developed in the course of the extensive litigation concerning the rights of aliens with regard to commercial and industrial property, did not immediately result in giving recognition to the benefits claimed under the treaties. On the contrary, the conflict was resolved by a restrictive interpretation of the treaties, which, the courts held, had not been intended to confer the rights claimed thereunder and denied by subsequent legislation. This wholly nominal reconciliation of the internal law with the prior international obligation, achieved by bending the treaty to conform with the law, was approved by the Court of Cassation in the famous case of *Sanchez v. Consorts Gozland*, December 22, 1931. No conflict existed, the court held, since the intention of the legislation at issue was to create for the exclusive benefit of French citizens a new civil right *stricto sensu*, of a character not envisaged at the time of the conclusion of the treaty.⁵⁶

⁵⁵ *Mélanges R. Carré de Malberg*, pp. 413-415. Also Chailley, *op. cit.*, pp. 315-321. Mestre likewise considers that "the treaty and the law appear as two acts situated on two different planes and which emanate from two different authorities, of which the one cannot be considered superior in relation to the other." *Op. cit.*, p. 275. He concludes, however, contrary to Chailley, that a law is capable of paralyzing the application of a prior treaty, on the usual ground that French public law does not accord to the courts a power of control. Even if they possessed such power with regard to the intrinsic constitutionality of laws, there would be no reason to conclude that they had such power with regard to the conformity of laws with treaties, since "a treaty is not an integral part of the Constitution. . . ." *Ibid.*, pp. 283-284. This argument has a bearing upon the present controversy as to whether such a power of judicial control may be implied from Art. 28 of the new Constitution.

⁵⁶ (*Ch. civ.*), *Sirey, Rec. gén.* (1932), Pt. I, p. 257; *Rev. de droit int. privé*, Vol. 27 (1932), p. 83. Also *Pagnone v. Duteil et Cie.*, Nov. 15, 1932, Court of Cassation (*Ch. req.*), *ibid.*, Vol. 28 (1933), p. 126; *Schreiber v. Bagaru*, Dec. 1, 1932, *Commission supérieure de cassation, ibid.*, p. 128 (with conclusions of M. Lyon-Caen, *avocat-général*).

The decisions by which this apparent reconciliation between the law and the treaties was reached were the object of numerous protests by foreign governments, whose charges of treaty violation were supported by the French Government itself. The latter, maintaining that it was the obvious intention of the treaties at issue to provide for complete equality of treatment between nationals and aliens,⁵⁷ embodied this understanding in a series of bilateral accords, which, it insisted, were conclusive upon the courts as to the interpretation of the treaties to which they related. After some initial resistance on the part of the courts, the application of these agreements was ensured through their publication in the *Journal Officiel* as presidential decrees.⁵⁸ Henceforth, the reconciliation of the treaty with the law was effected, not by so restricting the meaning of the former as to bring it into conformity with the latter, but by interpreting the law as intended to have application only in hypotheses not regulated by treaty, the interpretation of which was authoritatively determined by the inter-governmental agreement.⁵⁹ As the *Commission supérieure de cassation* stated in its decision of January 19, 1933:

In his conclusions in the *Sanchez* case, the *Procureur-général*, M. Paul Matter, cited the dictum of the Supreme Court of the United States in the case of *United States v. Mrs. Gue Lim* (1900), 176 U. S. 459: "If it can be reasonably done, an act of Congress should be so interpreted as to further the execution of a treaty, and not to violate its provisions." It could not, he said, be presumed that the legislator had intended to involve the French state in a violation of its international obligations; therefore, the deliberate exclusion of aliens from the benefits of the legislation must further be presumed to be in conformity with the treaty. "Finally," he concluded, "even if there should be a conflict between the Law of June 30, 1926 and the Franco-Spanish Convention of 1862—and I have just indicated that there is none—but, supposing that there is, what would be the duty of the judge? There is no doubt that in this event you recognize and can recognize no other will than that of the law. This is the very principle upon which rest our judicial institutions [citing *Whitney v. Robertson* (1888), 124 U. S. 190]." *Ibid.*, Vol. 27 (1932), pp. 102, 104, 109.

⁵⁷ The Minister of Foreign Affairs, in his report to the President of Feb. 17, 1933, commented upon the above decisions as follows: "If it sufficed, in order to abstain from the execution of international obligations, to declare that such or such a legal or regulatory provision is exceptional and additional to the common law, that it was not foreseen at the time these obligations were contracted, and that, consequently, it is reserved exclusively to nationals, there would no longer be any security in the engagements of powers; conventions would depend upon the unilateral good will of each of the contracting parties, and would no longer offer any guarantee." *Ibid.*, Vol. 28 (1933), p. 880. See documents cited, note 50, *supra*.

⁵⁸ On the binding force of executive interpretations of treaties in France, see Basdevant, in *Rev. crit. de droit int. privé*, Vol. 38 (1949), pp. 419-433; and notes by Ch. Rousseau, in *Annual Digest* (1929-1930), pp. 360-363; *ibid.* (1931-1932), pp. 370-371; *ibid.* (1919-1942), Supp. Vol., p. 230; also *Principes généraux*, pp. 650-675. For a list of the interpretative agreements, with citations to the cases applying them, *ibid.*, pp. 633-637.

⁵⁹ See, for example, *Huckendubler v. Hoeffleur*, Dec. 22, 1932, *Commission supérieure de cassation*, *Rev. de droit int. privé*, Vol. 28 (1933), p. 137, in which an exchange of

. . . French laws provide only with an express or tacit reservation as to the application and execution of diplomatic conventions; a derogation from this principle of general order, which would be of an especially serious character, cannot be inferred from silence maintained by the legislator in this regard. . . .⁶⁰

They must always be interpreted as "necessarily reserving a case in which an alien is able to invoke an international convention. . . ." ⁶¹

The above decisions, in excluding the tacit abrogation or neutralization of a treaty by a law, went far toward removing the possibility of a conflict, which henceforth could arise only if a law should contain provisions contrary *expressis verbis* to the obligations of a treaty. The presumption that the legislator has not intended unilaterally to modify a prior treaty necessarily admits, however, that he possesses the power to do so, and that a later law, formally contrary to the terms of a treaty, would be applied. But, at least, the presumption places the responsibility for such a violation squarely upon the legislator, where it primarily belongs, and may tend to discourage legislation intended to prevail without regard to prior international obligations, while shifting to the courts the burden of producing an appearance of legality through the spurious interpretation of both the treaty and the law.⁶²

Article 28 of the Constitution of 1946 is designed to exclude the possibility of legislation enacted in formal and express violation of prior treaty engagements. In solemnly proclaiming that "treaties have superior authority to that of French internal legislation" it imposes directly upon the legislator a duty to maintain the conformity of French law with the international

letters between the French and Swiss governments, July 11 and 26, 1929, published in the *Journal officiel*, Aug. 5-6, 1929, was held to constitute "a contractual interpretation . . . ; whatever its form, this bilateral interpretation . . . constitutes an integral part of the convention [of 1882] itself, and must be observed and applied as the official expression of the common intention of the interested Governments. . . ." Also, *Société Ruegger et Boutet v. Société Weber et Howard*, April 25, 1934, Civil Tribunal of the Seine, *Rev. crit. de droit int.*, Vol. 32 (1937), p. 86, in which a bilateral interpretation was assimilated to "a clause added to the treaty and embodied therein, which has the same authority, and, like it, has the force of law."

⁶⁰ *Dame veuve Python v. Demoiselle Baumann*, Jan. 19, 1933, *Commission supérieure de cassation, Recueil Dalloz . . . hebdomadaire* (1933), p. 118.

⁶¹ *Zumkeller v. Florence et Peillon*, Feb. 4, 1936, Court of Cassation (*Ch. civ.*), *Sirey, Rec. gén.* (1936), Pt. I, p. 257; Annual Digest (1935-1937), Case No. 202, p. 424 (with note by W. L. Walker). Also *Coll et Osanas v. Tisserand*, Feb. 16, 1937, Court of Cassation (*Ch. civ.*), *Rev. crit. de droit int.*, Vol. 33 (1938), p. 245.

⁶² Compare the remarks of the President of the Legislative Commission of the Senate, April 8, 1927, in arguing that the benefits of the legislation with regard to commercial property be reserved exclusively to French citizens and to aliens whose countries provided legislative reciprocity. "We are inspired by the idea of equity . . .," M. Penancier declared. "If aliens allege that they are the beneficiaries of treaties and invoke rights thereunder, the tribunals will evaluate their claims." *Rev. de droit int. privé*, Vol. 27 (1932), p. 98.

obligations of France. As the Constitutional Committee stated in its final Report, it seemed "highly desirable to inscribe in the Constitution that the treaty is a source of law parallel to legislation and totally independent of it."⁶³ Henceforth, treaties are not subject to modification by law, and the duty to ensure respect for international treaty obligations is elevated to the rank of a constitutional principle.

Although the new Constitution thus reinforces the formal *authority* of the treaty, it is not at all certain that it provides any additional guarantees which would ensure its application in the event that a law should expressly provide for its own enforcement notwithstanding the provisions of any prior treaty. It is probably significant that the draft Constitution at one stage contained a provision—later suppressed—that "Diplomatic treaties possess an authority superior to that of internal laws, which cannot do violence to their provisions";⁶⁴ and that the framers declined to adopt the judicial review of the constitutionality of laws, which, in the opinion of M. Cot, the principal author of the Constitution, was "condemned, in effect, by the American experience."⁶⁵

Even so consistent a champion of the supremacy of treaties as Professor Niboyet, writing shortly after the adoption of the new Constitution, has asked:

What would happen if the Assembly should vote a law contrary to the primacy of a treaty, and what, in such an event, should be the attitude of the tribunals? It is imperative to recognize that the latter have received no new power, and that this somewhat weakens the force of Article 28. Even if the law should indisputably conflict with a treaty, and if such were indeed its intention, the tribunals, in the future as in the past, will be disarmed.⁶⁶

Since a treaty belongs to the "*supra-national order*" and is "stronger" than the law, it would have been "desirable that the new French Constitution contain a clause which would mark expressly the primacy of the diplomatic treaty. Only, in order to have a sanction for a clause of this kind, even if it be inscribed in the Constitution, it is indispensable to have what we have never had—a constitutional jurisdiction. . . . But if there is no constitutional jurisdiction, a clause in the Constitution has no great practical interest."⁶⁷

Two years later, Professor Niboyet, apparently influenced by certain decisions which seemed to render somewhat pessimistic his earlier estimate of the potentialities of Article 28, returned to the position which he had always maintained before 1946. ". . . The fundamental and constitutional

⁶³ Quoted by Mouskhély, *op. cit.*, p. 108.

⁶⁴ *Commission de la Constitution, Séances* . . . (cited, note 13, *supra*), pp. 192, 711.

⁶⁵ *Ibid.*, p. 103.

⁶⁶ *Recueil Dalloz* . . . hebdomadaire, *Chronique XXIII*, p. 91.

⁶⁷ *Cours de droit international privé* (Paris, 1946), p. 44.

rule of Article 28," he declared, "has not for its sole sanction that of constitutional guarantees in general [Articles 92 and 93], but henceforth judges themselves have the right—and, we shall add, the duty—in the event of a conflict between a more recent law and a prior treaty, to make the latter prevail at every stage. . . ." ⁶⁸

Jurists appear to be in general agreement with Niboyet's first view. The judge, Mouskhély declares, "faced with a law formally and overtly contrary to a treaty would doubtlessly be obliged to yield to the incontestable will of the legislator." From the refusal of the framers to provide for judicial control of constitutionality it follows that "a law voted and promulgated is considered to respect the Constitution, and the judge can only apply it. If he should act otherwise, he would infringe upon the powers of the Constitutional Commission [Articles 90-93], and would act unconstitutionally. An action of this kind would simply be inconceivable on the part of the French tribunals." ⁶⁹ The tribunals cannot provide a sanction against *excès de pouvoir* of the legislator. Niboyet's argument to the contrary, therefore, encounters a logical difficulty, for "the judge would not merely affirm the hierarchy of norms in applying the stronger [the treaty]: he would exercise a choice, since he would discard one to the advantage of the other; however, a power to choose would then be necessary, and that power the judge does not possess." ⁷⁰ A law in contravention of a treaty would be unconstitutional, but the competence of the legislator to enact it would not be subject to judicial sanction or control. ⁷¹

The controversy as to the incidence of the constitutional obligation contained in Article 28 has not been clearly resolved by judicial practice, which, understandably, has sought to avoid a frontal attack upon the principal problem. There have apparently been only two cases in which the

⁶⁸ *Rev. crit. de droit int. privé*, Vol. 37 (1948), p. 283.

" . . . It does not seem that any authority may, without committing an illegal act, apply legislation violating the obligation of treaties. One cannot object to this interpretation on the ground that judges are incompetent to review the constitutionality of laws, for we are not here concerned with saying that a law contrary to a treaty is unconstitutional as such—which it, however, certainly is—but with choosing between two contrary legislative systems that which the Constitution invests with a superior authority. As a general rule, the most recent law prevails over the older; but it is otherwise when the former is enacted for the execution of a treaty or when it consists of an authorization to ratify. In the latter case there exists between the laws a different hierarchy than was introduced solely by time. To decide a conflict between laws in the name of this hierarchy is not to exercise a control of constitutionality, but is to seek the authentic will of the legislator as it is defined in the Constitution itself. *Lex posterior derogat priori nisi prior superioris*." J. Donnedieu de Vabres, *op. cit.*, p. 8.

⁶⁹ *Op. cit.*, p. 115.

⁷⁰ Henri Motulsky, in *Rev. crit. de droit int. privé*, Vol. 38 (1949), p. 63.

⁷¹ Henri Battifol, *ibid.*, Vol. 36 (1947), p. 481; *Traité élémentaire de droit international privé* (Paris, 1949), pp. 40-42. Also Roger Pinto, *Éléments de droit constitutionnel* (Lille, 1948), p. 333.

problem of a conflict between a law and a prior treaty has been squarely faced, and the primacy of the treaty affirmed. The Court of Appeal of Paris, in the case of *Lambert v. Jourdan*, decided January 30, 1948, refused to apply legislation enacted on May 7, 1946, the effect of which would have been to deny to the appellant rights to which he was entitled under a convention concluded between the United States and France in 1853.⁷² Even if this law were deemed to supersede earlier legislation which recognized the right claimed, "it must not be forgotten," the court stated, "that the Constitution of the French Republic of October 27, 1946 has since . . . been promulgated, and that a constitutional law prevails over ordinary laws." The interpretation of the treaty was fixed by an interpretative agreement concluded in 1933, and "the special authority attaching to treaties is now all the more strongly affirmed since the new Constitution has formally proclaimed it. . . ." It is relevant, therefore, only to determine in each case "the rights which a foreign national may possess, whether from treaties binding his country and France—treaties which an ordinary law can neither modify nor denounce—or from an internal French law entering within the framework of the treaty." The same court on February 18, 1948, held, in the case of *Kober v. Chollet*, that the law of May 7, 1946, could not deprive the appellant of a right derived from the Geneva Convention of February 10, 1938.⁷³

Even in the above cases the court could have avoided any direct pronouncement on the effect of Article 28 by invoking the principle, firmly established by the Court of Cassation as early as 1936,⁷⁴ that legislative provisions shall be deemed to be applicable only to aliens who are unable to

⁷² *Rev. crit. de droit int. privé*, Vol. 37 (1948), p. 493 (annotation by Ph. Francescakis); this JOURNAL, Vol. 44 (1950), p. 206.

It was further held that the provisions of Art. 26 and 28 "incontestably envisage not only treaties to be concluded after the promulgation of the Constitution, but also those already in force and not denounced, and whose denunciation, furthermore, may take place only in conformity with the Constitution."

In *Chonohol v. Dame Vita*, Nov. 10, 1947, *Rev. crit. de droit int. privé*, Vol. 37 (1948), p. 275, the Court of Appeal of Aix reversed a judgment of the Civil Tribunal of Nice, which had applied legislation enacted in 1926 in derogation of the terms of the Treaty of Lausanne of 1923. Since the decision was based upon a subsequent law which expressly reserved rights derived from treaties, there was, strictly speaking, no conflict. The dicta of the Court of Aix are, nevertheless, of interest, since they are perhaps the first to affirm unequivocally that Art. 28 of the new Constitution establishes the jurisdictional control of constitutionality. Referring to that law, which was inspired by a desire to avoid the often justified charge of non-fulfilment of international obligations resulting from legislation restricting the application of prior treaty provisions, the court stated: ". . . These considerations, which lead the judge from now on to give priority to diplomatic conventions which are unequivocal in their terms—as in the present case—are reinforced by Article 28 of the new French Constitution. . . ." See comment by J.-P. Niboyet, *ibid.*, pp. 280-283.

⁷³ *Rev. crit. de droit int. privé*, Vol. 38 (1949), p. 516.

⁷⁴ *Zumkeller v. Peillon*, cited, note 61, *supra*.

invoke the benefit of a treaty. This principle, which may now be said to be one of obligatory interpretation, was applied by the Court of Cassation in *Époux Verbrigghe v. Demoiselle Bellest*, decided July 11, 1947.⁷⁵ In this case the *Chambre sociale* annulled a judgment which, by application of an ordinance of October 11, 1945, denied to plaintiffs rights derived from a treaty concluded between France and Belgium in 1927, as interpreted by an agreement published as a decree in 1933. Without referring to Article 28, the court held that the law, which contained no mention of treaty rights, "necessarily reserves the case in which an alien can invoke an international convention. . . ." ⁷⁶

Although it thus contains no striking innovation upon previous practice, Article 28 of the new Constitution is, nevertheless, of considerable significance. First, it will recall to the legislator—always inclined to emphasize the *souveraineté de la loi*—his constitutional duty to respect the international obligations of France. Secondly, it should tend toward strengthening the political guarantees against legislation which, in violating treaty obligations, would also violate the Constitution.⁷⁷ Thirdly, it reinforces the judicial rule of interpretation by which the intention of the legislator to conform to treaty obligations becomes a presumption rebuttable only by the most express evidence of a contrary intent.⁷⁸ Finally, in recognizing that treaties constitute a source of law distinct from, and superior to, in-

⁷⁵ *Rev. crit. de droit int. privé*, Vol. 36 (1947), p. 429 (annotation by H. Battifol).

⁷⁶ *Accord*, the following decisions of the *Chambre sociale*: *Affaire Amadio*, Feb. 13, 1948, *ibid.*, Vol. 37 (1948), p. 486; *Braun v. Thureau*, July 28, 1948, *ibid.*, Vol. 38 (1949), p. 307; *Poinsot v. Kurica*, Nov. 25, 1948, *ibid.*, p. 308 (annotation by Henri Monneray), this JOURNAL, Vol. 44 (1950), p. 210.

In an exceptional decision, the Court of Appeal of Paris, Jan. 7, 1948, *Rev. crit. de droit int. privé*, Vol. 38 (1949), p. 512, in the case of *Hébertot v. Ssepokowski* had considered that the rental legislation of 1946 had superseded both an earlier law and the Franco-Polish treaty of 1937. After an examination of the *travaux préparatoires* the court concluded that it had been the intention of the legislator to exclude from the benefits of the law of 1946 aliens who, like the respondent, had not fought during the war on the side of France. See comment by Ph. Francescakis. This case may be considered overruled by *Poinsot v. Kurica*, *supra*.

⁷⁷ According to Pinto, *op. cit.*, p. 333, the guarantee of the rule laid down in Art. 28 is political rather than judicial. The National Assembly, through operation of the *question préalable*, will be able to reject bills in violation of a treaty; the President of the Republic, upon demand of the Cabinet, may require a second deliberation; and, finally, the Constitutional Committee may intervene.

⁷⁸ Jean Mazeaud, in *Juris-classeur périodique* (1949), Pt. II, p. 4691 (quoted by Mouskhély, *op. cit.*, p. 115), summarizes this principle as follows: "... Every time that the legislator has not manifested precisely, certainly and indisputably, a contrary will in the very text of the law, . . . the judge will give effect to the treaty; he will say that the legislator . . . has not had the intention of withdrawing implicitly from his international obligations. This rule of interpretation . . . finds its support in the Constitution, in the higher principles of law. The slightest hesitation in the text or weakness in drafting will permit the victorious return of the general rule."

ternal legislation, it reinforces the authority of the executive, as the treaty-making power, in imposing upon the courts an interpretation calculated to give to treaties a maximum of effect.⁷⁹

The final provision of Article 28 introduces a new procedure for the abrogation, modification and suspension of treaties. Under the Third Republic it was recognized that this was a power to be exercised at the sole discretion of the President of the Republic, and that it was applicable to all treaties, including those ratified with legislative approval.⁸⁰ The new solution requires that denunciation take place formally through diplomatic channels,⁸¹ and that it be approved by the National Assembly in the case of treaties falling within the categories listed in Article 27, with the exception of commercial treaties.⁸²

The effect of the French Constitution of 1946 is not so much to introduce innovations as to resolve long-standing controversies and to reinforce existing trends toward the enhancement of the authority of international law. The reference to the general law in the Preamble, while essentially declaratory, furnishes an unquestionable basis for the practice of the tribunals in resorting directly to customary rules whenever they are susceptible of judicial application. The provisions with regard to treaties manifest an equal respect for the international principle of *pacta sunt servanda* and the constitutional principle of the separation of powers. Treaties modify prior laws, but only if the legislator has approved; treaties are superior to later laws, and so remain until the authority which has created them has agreed to their termination.

⁷⁹ Executive interpretations, which are given retroactive effect, sometimes doubtlessly impute a wholly fictitious will to the original negotiators; equally, they sometimes impute to the legislator a fictitious will to respect the will of the negotiators thus established *ex post facto*.

In *Becker v. Préfet de la Moselle*, June 22, 1948, *Rev. crit. de droit int. privé*, Vol. 38 (1949), p. 55, the Tribunal of Sarreguemines held that an exchange of letters between the French and the German governments, dated May 6, 1939, containing an interpretation of §1, par. 2 of the Annex to Section V of the Treaty of Versailles, "even in the absence of any ratification by the Chambers giving the agreement the force of law . . . clearly establishes the intention of the High Contracting Parties," and was binding upon the court. See criticism by H. Motulsky, *ibid.*, pp. 61-63.

⁸⁰ See *Renault et Société des Usines Renault v. Société Rousski Renault* (cited, note 19, *supra*); and Rousseau, *op. cit.*, pp. 527-528.

⁸¹ Niboyet is of the opinion that Art. 28 refers only to formal denunciation, and that it does not exclude other methods such as termination for adverse breach or as a measure of reprisal, which remain within the discretionary power of the executive. *Rev. crit. de droit int. privé*, Vol. 37 (1948), p. 485.

⁸² Articles 26-28 are silent on the problem of the renewal of treaties concluded for limited periods. It may be presumed that the practice of the Third Republic, which recognized that the power of prorogation belonged to the executive, will be continued. See *Millat v. Dame Seostersoneck et de Froding*, May 14, 1935, Court of Cassation (*Ch. req.*), *Sirey, Rec. gén.* (1936), Pt. I, p. 281; and Rousseau, *op. cit.*, p. 234.

The new Constitution reflects the conservatism of the French tradition in what it fails to do, but it also represents the best in that tradition by the progress it records. The liberal spirit which affirms the superiority of international obligation within the nation further acknowledges the goal of integrating the nation into the organized community of mankind, in proclaiming that "France, on condition of reciprocity, accepts the limitations of sovereignty necessary to the organization and defense of peace."⁸⁸

⁸⁸ Par. 15, Preamble. *Cf.* Art. 11, Constitution of the Italian Republic, Dec. 27, 1947, Department of State, Documents and State Papers, Vol. 1 (1948), p. 47; Peaslee, *Constitutions of the Nations*, Vol. II, p. 281; and Art. 24 (1), Basic Law of the Federal Republic of Germany (cited, note 16, *supra*).

RECENT DEVELOPMENTS IN HIGH SEAS FISHERIES
JURISDICTION UNDER THE PRESIDENTIAL
PROCLAMATION OF 1945

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On September 28, 1945, the President of the United States issued two proclamations asserting jurisdiction and control for certain purposes over areas of the high seas.¹ These proclamations suggested the introduction of a new element into United States policy with regard to high seas jurisdiction even though the press release of September 28, 1945, which accompanied the proclamations, indicated that they did not purport to "extend the present limits of the territorial waters of the United States."²

The first proclamation is concerned with the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States;³ while the second proclamation is concerned with the establishment of conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Only the second proclamation will be discussed in this article. This proclamation reads as follows:

Now, therefore, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to coastal fisheries in certain areas of the high seas:

In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the

* The views expressed herein are the personal views of the author only.

¹ 59 U. S. Stat. L. 884, 885; this JOURNAL, Supp., Vol. 40 (1946), pp. 45, 46. See Borchard, "Resources of the Continental Shelf," this JOURNAL, Vol. 40 (1946), p. 53.

² Dept. of State Bulletin, Vol. XIII (Sept. 30, 1945), p. 484.

³ Discussed by Richard Young, "Recent Developments with Respect to the Continental Shelf," this JOURNAL, Vol. 42 (1948), p. 849.

United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected.⁴

It might be pointed out, parenthetically, that the need for effective conservation of high seas fisheries is very real today. One hundred years ago it was believed that the resources of the sea were practically inexhaustible—that the ocean was a bottomless reservoir of fish. Methods of fishing were relatively primitive, and the demand was not so great in relation to the supply as to cause any grave concern over depletion. During the last seventy-five years there has been, however, a steady trend toward exhaustion of some of the world's fisheries.⁵ The greater and greater demand for fish and fish products has had the effect of threatening the stock of many species of fish and marine animals with severe depletion or even extinction.⁶ Conservation measures have been taken in many cases to keep this extremely important resource from completely disappearing from the earth,⁷ and have had marked success in rebuilding the diminishing stocks.⁸

During the 1930's and until the outbreak of World War II there was concern over possible depletion of the Pacific salmon fisheries centering around Bristol Bay, Alaska, largely because of the activities of Japanese fishermen.⁹ An extension of seaward jurisdiction unilaterally was strongly

⁴ 59 U. S. Stat. L. 885; this JOURNAL, Supp., Vol. 40 (1946), p. 47; see comments by J. W. Bingham, this JOURNAL, Vol. 40 (1946), p. 173; E. W. Allen, 21 Wash. Law Review (1946) 1.

⁵ W. M. Chapman, "The Management of Marine Resources," address made before the Fishing Industry Conference of Maine at Rockland, Maine, Aug. 5, 1949.

⁶ For example, certain fish of the North Sea (such as the plaice); the halibut and sockeye salmon of the North Pacific Ocean; the Bering Sea fur-seal herds; and whales throughout most of the world.

⁷ See A. P. Daggett, "The Regulation of Maritime Fisheries by Treaty," this JOURNAL, Vol. 28 (1934), p. 693; L. L. Leonard, International Regulation of Fisheries (Wash., 1944); S. S. Hayden, The International Protection of Wild Life (N. Y., 1942); J. Tomasevich, International Agreements on Conservation of Marine Resources (Stanford, 1948); and H. E. Gregory and K. Barnes, North Pacific Fisheries (N. Y., 1939).

⁸ W. M. Chapman, "United States Policy on High Seas Fisheries," Dept. of State Bulletin, Vol. XX, No. 498 (Jan. 16, 1949), p. 69, and note 7 *supra*.

⁹ U. S. Dept. of State Press Releases, Vol. XVIII (Jan.-June, 1938), pp. 412-417. The U. S. Government made a statement in this regard to the Japanese Government, stating, *inter alia*, that: "The American Government must view with distinct concern the depletion of the salmon resources of Alaska. These resources have been developed and preserved primarily by steps taken by the American Government in cooperation with private

advocated in certain quarters,¹⁰ and several bills were introduced in Congress (the Copeland Bill and the Dimond Bill) which would have extended United States jurisdiction beyond three miles from shore.¹¹ Nothing came of these efforts, and the advent of the war removed the immediate problem.

It was realized, however, that in a geared-up modern world the situation would recur, in Bristol Bay or elsewhere, and that adequate measures would have to be taken in order that the interests of the United States be protected, and fisheries resources prudently utilized for today's needs and conserved for tomorrow, without violation of international law.¹² In 1945 President Truman issued the fisheries proclamation,¹³ thereby announcing a policy designed to provide for more effective use of marine resources in order "to make possible the maximum production of food from the sea on a sustained basis year after year."¹⁴ Under this proclamation it was apparently contemplated that a high seas fishery would be regulated by that nation or nations having a substantial interest in the fishery. Two criteria were indicated whereby a nation may be said to have a substantial interest in a fishery: (1) if the fishery is located in the high seas contiguous to its coasts, (2) if its nationals habitually resort to the fishery, thereby participating in its development and maintenance. It would seem, therefore, that where there exist interests of two or more nations in the same fishery, determined by the above criteria, regulation would properly be accomplished through international agreement. Certain developments since 1945 would seem to confirm this view. They are: (1) the entering of reservations on the part of the United States with regard to the continental shelf decrees of certain foreign nations, reservations couched in such language that it might have been unchanged had there been no United States proclamation, and (2) the negotiation of three treaties concerned with the conservation of high

interests to promote propagation and permanency of supply. But for these efforts, carried on over a period of years, and but for consistent adherence to a policy of conservation, the Alaska salmon fisheries unquestionably would not have reached anything like their present state of development.

"... the American Government believes that the safeguarding of these resources involves important principles of equity and justice. It must be taken as a sound principle of justice that an industry such as described which has been built up by the nationals of one country cannot in fairness be left to be destroyed by the nationals of other countries. . . ." *Ibid.*, pp. 414, 416-417.

¹⁰ J. W. Bingham, Report on the International Law of Pacific Coastal Fisheries (Stanford, 1938).

¹¹ See P. C. Jessup, "The Pacific Coast Fisheries," this JOURNAL, Vol. 33 (1939), p. 129.

¹² William W. Bishop, Jr., "The Exercise of Jurisdiction for Special Purposes in High Seas Areas beyond the Outer Limit of Territorial Waters (*e.g.*, Conservation, etc.)," address made before the Inter-American Bar Association, Sixth Conference, Detroit May, 1949.

¹³ *Supra*, p. 670.

¹⁴ Chapman, *loc. cit.*, p. 69.

seas fisheries, based apparently upon the principles of the Presidential proclamation.

Following the Presidential proclamation of the United States, a number of Latin American nations asserted claims to the continental shelf contiguous to their coasts.¹⁵ Among these nations were Argentina, Chile, and Peru. The President of Argentina, by Decree No. 1386 of January 24, 1944, and by Presidential Declaration of October 9, 1946,¹⁶ concerning the industrial utilization of the resources of the continental shelf and the coastal area, asserted sovereignty over the epicontinental sea and the continental shelf. Chile, by Presidential Declaration of June 25, 1947,¹⁷ proclaimed national sovereignty over the seas adjacent to its coasts, to the extent necessary to conserve and protect and make use of the resources of national wealth in such areas, and to prevent such resources from being exploited to the disadvantage of the inhabitants of Chile. Chile asserted "said protection and control over all the sea" to a distance of 200 maritime miles from the Chilean continental or insular coasts. Peru, on August 1, 1947,¹⁸ promulgated an Executive Declaration essentially similar to that of Chile.

On May 28, 1949, the Saudi Arabian Government promulgated Decree No. 6/4/5/3711 asserting seaward jurisdiction in the Persian Gulf beyond three miles from shore.¹⁹

On July 2, 1948, the United States Government took action with regard to the decrees of the three Latin American states. While expressing sympathy with the praiseworthy motives of these nations in seeking arrangements for the effective conservation and perpetuation of the resources of the subsoil and sea bed of the continental shelf and the protection of coastal fisheries, the United States Government pointed out that the principles of these decrees differed in large measure from those of the United States proclamations, and appeared to be at variance with generally accepted principles of international law. The United States Government noted in particular that these decrees (1) declared national sovereignty over the continental shelf and over the seas adjacent to the coasts of the respective nations outside the generally accepted limit of territorial waters, and (2) failed, with respect to fishing, to accord recognition to the rights and interests of the United States in the high seas adjacent to these nations. The United States Government therefore informed these governments, by separate notes each

¹⁵ For a discussion of these proclamations by other coastal nations see article by Young, cited *supra*.

¹⁶ Decrees No. 1,386/44, and No. 14,708/46, *Boletín Oficial de la República Argentina*, March 17, 1944, and Dec. 5, 1946; for translation of 1946 Declaration, see this JOURNAL, Supp., Vol. 41 (1947), p. 11.

¹⁷ *El Mercurio* (Santiago), June 29, 1947.

¹⁸ Decree No. 781, *El Peruano—Diario Oficial*, Aug. 11, 1947; also in *Revista Peruana de Derecho Internacional*, Vol. 7 (1947), p. 301.

¹⁹ This JOURNAL, Supp., Vol. 43 (1949), p. 154. See note by Richard Young entitled "Saudi Arabian Offshore Legislation," this JOURNAL, Vol. 43 (1949), p. 530.

dated July 2, 1948, that "it reserved the rights and interests of the United States so far as concerns any effects" of the decrees in question, or of any measures designed to put those decrees into operation. The full text of the note to Chile is as follows:

Santiago, July 2, 1948.

Excellency:

I have the honor to refer to the Decree issued by the President of the Republic of Chile on June 25, 1947 concerning the conservation of the resources of the continental shelf and the epicontinental seas and to advise that I have been instructed by my Government to make certain reservations with respect to the rights and interests of the United States of America.

The United States Government has carefully studied this declaration of the President of the Republic of Chile. The Declaration cites the Proclamations of the United States of September 28, 1945 in the Preamble. My Government is accordingly confident that His Excellency, the President of the Republic of Chile, in issuing the Declaration, was actuated by the same long-range considerations with respect to the wise conservation and utilization of natural resources as motivated President Truman in proclaiming the policy of the United States relative to the natural resources of the subsoil and sea bed of the continental shelf and its policy relative to coastal fisheries in certain areas of the high seas. The United States Government, aware of the inadequacy of past arrangements for the effective conservation and perpetuation of such resources, views with utmost sympathy the considerations which led the Chilean Government to issue its Declaration.

At the same time, the United States Government notes that the principles underlying the Chilean Declaration differ in large measure from those of the United States Proclamations and appear to be at variance with the generally accepted principles of international law. In these respects, the United States Government notes in particular that (1) the Chilean Declaration confirms and proclaims the national sovereignty of Chile over the continental shelf and over the seas adjacent to the coast of Chile outside the generally accepted limits of territorial waters, and (2) the Declaration fails, with respect to fishing, to accord appropriate and adequate recognition to the rights and interests of the United States in the high seas off the coast of Chile. In view of these considerations, the United States Government wishes to indicate to the Chilean Government that it reserves the rights and interests of the United States so far as concerns any effects of the Declaration of June 25, 1947, or of any measures designed to carry that declaration into execution.

The reservations thus made by the United States Government are not intended to have relation to or to prejudice any Chilean claims with reference to the Antarctic Continent or other land areas.

The Government of the United States of America is similarly reserving its rights and interests with respect to decrees issued by the Governments of Argentina and Peru which purport to extend their sovereignty beyond the generally accepted limits of territorial domain.

I take this opportunity to renew to Your Excellency the assurances of my highest and most distinguished consideration.

CLAUDE G. BOWERS

The note to Argentina is essentially similar, as is that to Peru, although the latter contains no reference to the Antarctic.

With regard to the Saudi Arabian Decree, the United States Government on December 19, 1949, presented the following note to the Saudi Arabian Government:

Jidda, December 19, 1949

Excellency:

I have the honor, acting under instructions of my Government, to inform Your Excellency as follows:

"The United States has taken note of Decree No. 6/4/5/3711 issued by the Kingdom of Saudi Arabia on May 28, 1949, concerning the territorial waters of Saudi Arabia, and finds itself compelled to take exception to certain provisions thereof, deeming such provisions to be unsupported by accepted principles of international law, and to reserve all its rights and the rights of its nationals with respect thereto, namely:

1. All provisions to the effect that the inland waters of the Kingdom include waters outside of ports, harbors, bays, and other inclosed arms of the sea along its coast; and
2. All provisions to the effect that the coastal sea, i.e., the marginal sea, of the Kingdom extends seaward of a belt of three nautical miles along its coast or around its islands."

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

His Excellency
Shaikh Yusuf Yassin,
Acting Foreign Minister,
JIDDA.

Two other nations, Mexico and Costa Rica, also concerned with the conservation of marine resources off their coasts, declared their intention to conserve this wealth. On October 29, 1945, the President of Mexico issued a declaration concerning the continental shelf surrounding the shores of Mexico.²⁰ After pointing out the need for conservation, the declaration stated:

On these grounds the Government of the Republic of Mexico reclaims all the continental shelf or base adjacent to its coasts and all and each of the known and unknown natural riches found therein and proceeds to the supervision, use and control of the zones of fishing protection necessary for the conservation of such a source of prosperity.

The foregoing does not mean that the Mexican Government is seeking to disregard legitimate rights of a third party on reciprocal bases, or that the rights of free navigation on the high seas are affected, as the only thing that it seeks is to conserve those resources for the national, continental and world welfare.²¹

²⁰ *Excelsior* (Mexico City), Oct. 30, 1945.

²¹ Translation by the U. S. Department of State.

The Government of Costa Rica, by Decree No. 116 of July 29, 1948, asserted national sovereignty over the seas adjacent to the continental and insular coasts of Costa Rica, to a distance of 200 marine miles.²²

These declarations have never been put into effect, and the United States has recently entered into bilateral treaties with these two nations for the conservation of fisheries off their coasts in which the United States has an interest, and also into a multilateral agreement with a number of other nations with regard to fisheries conservation in the northwestern Atlantic area.

On January 25, 1949, a convention was signed at Mexico City between the United States and Mexico for the establishment of an International Commission for the Scientific Investigation of Tuna,²³ to deal with fisheries problems in "the waters of the Pacific Ocean off the coasts of both countries";²⁴ and on May 31, 1949, a convention was signed at Washington, D. C., between the United States and Costa Rica for the establishment of an Inter-American Tropical Tuna Commission²⁵ to deal with the waters of "the eastern Pacific Ocean" fished by the nationals of the High Contracting Parties.²⁶ Both conventions are concerned with tuna, tuna-like, and tuna-bait fishes, and are purely investigatory at this stage.²⁷ The treaty with Costa Rica provides for adherence by any other government whose nationals participate in the fishery, provided the signatories give their unanimous consent.²⁸

The third recent international agreement having as its objective the conservation of the stock of fish in high seas fisheries, signed at Washington under date of February 8, 1949, is the International Convention for

²² San José, *La Gaceta*, July 29, 1948, p. 1.

²³ Cong. Rec. (81st Cong., 1st Sess.), Vol. 95, pp. 11867-8; and Dept. of State Bulletin, Vol. XX, No. 501 (Feb. 6, 1949), p. 174.

²⁴ Ex. K. (81st Cong., 1st Sess.), p. 3.

²⁵ Cong. Rec., *loc. cit.*, pp. 11868-9; and Dept. of State Bulletin, Vol. XX, No. 519 (June 12, 1949), p. 766.

²⁶ Ex. P (81st Cong., 1st Sess.), p. 3.

²⁷ The tuna industry of the United States has experienced an extraordinary growth within the last twenty years and is now the richest of our offshore fisheries. The principal fishery grounds are on the high seas off the Pacific Coast of the American Continent, from Mexico southward to northern Peru. About 90 percent of the tuna catch landed by American fishermen is taken in these waters, and the American catch accounts for about 95 percent of the total amount of tuna harvested in this area by all countries. Hearings before the Subcommittee of the Senate Foreign Relations Committee, July 14, 1949, printed in *The Fisheries Conventions* (U. S. Govt. Printing Office, Wash., D. C., 1949), pp. 54-55.

²⁸ The Secretary of State announced Aug. 18, 1949, that the Senate had unanimously advised ratification of these two treaties, as well as the Northwest Atlantic Fisheries Treaty (Dept. of State Bulletin, Vol. XXI, No. 581 (Sept. 5, 1949), p. 355). The President ratified them on Aug. 31 and Sept. 1, 1949. (Information furnished by the Department of State.)

the Northwest Atlantic Fisheries.²⁹ The nations participating were Canada (and Newfoundland), Denmark, France, Iceland, Italy, Portugal, Norway, Spain, the United Kingdom, and the United States.

The fisheries of the northwest Atlantic Ocean, off the coasts of New England, Newfoundland, Labrador and Greenland, have been resorted to by fishermen of a number of nations for over 300 years. European fishing vessels were sailing to the Grand Banks of Newfoundland before there was a permanent white settlement in the Western Hemisphere.³⁰ The recognition of the seriousness of the fish depletion problem in the northern Atlantic area had prompted the calling of several conferences in London during the last fifteen years.³¹ At the 1946 conference the United States, represented by an observer delegation, suggested that there are actually two fishing areas in the North Atlantic, and that they should be treated separately because of the nationals concerned and the problems involved. The Overfishing Convention of 1946 therefore delimited the western boundary of its convention area at 42° west longitude. The United States thereupon took the initiative in developing means for international coöperation with regard to the fisheries of the North Atlantic Ocean west of 42° west longitude, and invited the nations which appeared to have legitimate interests in these fisheries to a conference to be held in Washington beginning January 26, 1949.³² In determining which nations had such an interest in the fisheries of this area, the principles of the Presidential Proclamation of 1945 were kept in mind, and the two criteria mentioned above were employed: (1) the interests of coastal nations, and (2) the interests of nations whose fishing vessels frequented the area. Accordingly, nations like Spain, Portugal, and Italy were invited, since their fishing fleets have sought cod on the Great Banks for many generations.

The agreement was signed in Washington on February 8, 1949, and set up machinery for the scientific investigation of the stock of fish in the convention area. Since a number of distinct fisheries exist in this area, and not all signatories were interested in each fishery, it was found convenient to subdivide the over-all area into five sub-areas, primarily for administrative purposes.³³ The convention makes provision not only for investigation, but for eventual regulation when investigation shows that to be necessary

²⁹ Cong. Rec., Vol. 95, pp. 11860-5; and U. S. Dept. of State, Documents and State Papers, Vol. 1 (1948-49), pp. 711-716.

³⁰ For an historical treatment of this area, see Charles Carter and Staff, "Treaties Affecting the Northeastern Fisheries," U. S. Tariff Commission Report No. 152, 2nd Ser. (1944).

³¹ The International Convention for the Regulation of the Meshes of Fishing Nets and the Size and Limits of Fish, London, March 23, 1937, published as Misc. No. 5 (1937), Papers Relating to Foreign Affairs Laid before Parliament; and the International Overfishing Convention, London, April 5, 1946, published as Misc. No. 7 (1946), *ibid.*

³² Dept. of State Bulletin, Vol. XIX, No. 491 (Nov. 28, 1948), p. 669.

³³ *Ibid.*, Vol. XX, No. 506 (March 13, 1949), p. 319.

and desirable, provided all governments represented on the panel (commission) of a sub-area consent.

Significant from the point of view of international law is the fact that, in the view of the United States Department of State,⁸⁴ and as stated by the Senate Committee on Foreign Relations,

The conventions introduce no innovation in United States fisheries policy. They represent the initial application of the principles of the Presidential Proclamation of September 28, 1945, concerning the policy of the United States with respect to the conservation of coastal fisheries in certain areas of the high seas. In addition they seek to apply in new high seas areas long-established conservation principles and practices found effective in the halibut and sockeye-salmon fisheries of the northeast Pacific Ocean, in the management of which the United States and Canada have now some thirty-eight years of successful experience.⁸⁵

Another aspect of the Northwest Atlantic Convention would seem to shed some further light upon the matter with which we are concerned. Article I, paragraph 2 of the Convention reads:

Nothing in this Convention shall be deemed to affect adversely (prejudice) the claims of any Contracting Government in regard to the limits of territorial waters or to the jurisdiction of a coastal state over fisheries.

While serving the purpose of removing controversy regarding the proper limit of territorial waters,⁸⁶ this paragraph has called attention to the fact that there are probably two types of jurisdiction over fisheries, and may help to clarify the position of the United States in this regard.

Although the United States has, during its history, exercised jurisdiction for special purposes farther seaward than three miles from shore, for example, under the customs laws, the "Liquor Treaties," and the Anti-Smuggling Act,⁸⁷ its policy since the time when Thomas Jefferson was Secretary of State has been that three nautical miles or one marine league constitutes the proper limit of territorial waters.⁸⁸ This policy has been referred to

⁸⁴ Hearings before the Subcommittee of the Senate Foreign Relations Committee, July 14, 1949, printed in *The Fisheries Conventions* (U. S. Govt. Printing Office, Wash., D. C., 1949), pp. 54-55.

⁸⁵ Sen. Ex. Rept. No. 11, 81st Cong., 1st Sess., pp. 3-4.

⁸⁶ Art. III of the London Overfishing Convention of April 5, 1946, reads: "Nothing in this Convention shall be deemed to prejudice the claims of any Contracting Government in regard to the limits of territorial waters." Note 31, *supra*.

⁸⁷ See P. C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (New York, 1927); W. E. Masterson, *Jurisdiction in Marginal Seas* (New York, 1929); S. Riesenfeld, *Protection of Coastal Fisheries under International Law* (Washington, 1942); and P. C. Jessup, "The Anti-Smuggling Act of 1935," this JOURNAL, Vol. 31 (1937), p. 101.

⁸⁸ Mr. Jefferson, Secretary of State, to Mr. Hammond, British Minister, Nov. 8, 1793, 1 Moore's Digest 703; 39 Columbia Law Review (1939) 817, 821-822.

by many Secretaries of State,³⁹ and upheld by the Supreme Court of the United States.⁴⁰ Within this zone the United States has claimed sovereignty, and has regarded the fisheries therein as being under its sole control and reserved to the use of its nationals in the absence of a treaty to the contrary.⁴¹

It is submitted that the fisheries proclamation of 1945 has not changed the policy of the United States with regard to the extent of territorial waters, and that the jurisdiction and control to be exercised over high seas fisheries under that proclamation is not an extension of sovereignty beyond three miles from shore, but rather a special type of jurisdiction for a limited purpose, a jurisdiction which must be jointly exercised whenever the substantial interests of more than one nation are involved. This conclusion would seem to follow from the facts that (1a) the proclamation itself states that "the character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected,"⁴² and (1b) the accompanying White House Press Release expressly stated that the proclamation did not purport to "extend the present limits of the territorial waters of the United States";⁴³ (2) the United States protested the coastal jurisdiction decrees of Argentina, Chile, Peru and Saudi Arabia as acts in violation of international law in asserting sovereignty over areas of the high seas;⁴⁴ and (3) the United States negotiated treaties with Mexico and Costa Rica to deal with the fisheries off their coasts in which American fishermen had an interest,⁴⁵ thereby achieving conservation at the international level as contemplated for a multi-nation fishery under the Presidential Proclamation of 1945, in fisheries which the coastal states had apparently originally planned to regulate unilaterally. In other words, the United States would seem to have made two "converts" to the principles of the Presidential Proclamation; and (4) as perhaps the best example of the working of the principles of the Presidential Proclamation, the United States, in taking the initiative to call a conference to draw up a treaty for the conservation of the Northwest Atlantic fisheries, followed those principles in determining which nations had a substantial interest in those fisheries, and would therefore properly be parties to any regulation thereof,⁴⁶ and it was all these nations which became signatories to the treaty and participators in the conservation program launched thereby.

³⁹ I Moore's Digest 704, 705; I Hackworth's Digest 631, 634, 637-8, 639, 640, 643.

⁴⁰ *Cunard S. S. Co., Ltd. v. Mellon* (1928), 262 U. S. 100.

⁴¹ Sec. 251, Title 46, U.S.C., and Sec. 4.96(a) of the Customs Regulations of 1943.

⁴² *Supra*, p. 671.

⁴³ Note 2, *supra*.

⁴⁴ *Supra*, p. 673.

⁴⁵ Notes 23, 24, 25, 26, *supra*.

⁴⁶ *Supra*, p. 677.

Further, the United States Senate gave its unanimous advice and consent to the ratification of these treaties,⁴⁷ and during their consideration before that body, Senator Green, the Chairman of the Senate Foreign Relations Committee's subcommittee which had held hearings on the treaties, stated it to be his opinion that:

The proclamation was misinterpreted by several nations, which assumed it to mean that the United States would accept the extension of the sovereignty of those nations over the high seas off their coasts. The United States is strongly opposed to such extension of sovereignty on several grounds. The result of such extension of sovereignty out into the high seas could very well be disastrous to our interests in a number of high seas fisheries. We have very important fisheries off the coasts of other countries, such as the Grand Banks fisheries in which the United States fishermen have participated since the earliest history of our country; the shrimp fisheries in the Gulf of Mexico which were explored and developed by our fishermen; the tuna fishery off the west coast of Latin America which is a most valuable fishery and has been developed exclusively by United States fishermen; the several important fisheries which have been jointly developed by United States and Canadian fishermen off the coast of British Columbia.

To make the United States position crystal clear on this serious question, this Government has stated that the United States would be willing to place its fishermen under the same regulations as the fishermen of any other nation operating in any fishery provided that: (1) the regulations have been shown by scientific investigation to be necessary in order to prevent overfishing, and (2) the United States has an equal voice with any other nation in determining the regulations to be applied.⁴⁸

And finally, Dr. W. M. Chapman, as spokesman for the Department of State, has made it clear that the Presidential Proclamation of 1945 concerning fisheries does not purport to extend sovereignty beyond three miles from shore, nor in any manner attempt to change international law. He recently remarked that "... the United States Government claims and asserts an extent of territorial waters everywhere along its coast and along the coasts of its territories and islands under its possession or jurisdiction of three marine miles"; and that "... the territorial limits of the U. S. are precisely the same as before Sept. 28, 1945, namely, three marine miles seaward from the coast, the continental shelf Proclamation not having affected them."⁴⁹ And he has commented upon the action taken by certain foreign governments purporting to extend their sovereignty seaward in some cases up to two hundred marine miles, and has characterized this ac-

⁴⁷ Note 28, *supra*.

⁴⁸ Cong. Rec., Vol. 95, p. 11866.

⁴⁹ Statement by W. M. Chapman, Special Assistant to the Under Secretary of State, before an executive hearing of the Subcommittee on Fisheries of the House Committee on Merchant Marine and Fisheries, Thursday, May 25, 1950 (Unpublished; made available to the author by Dr. Chapman).

tion as carving "the oceans of the world into segments of sovereign territory in the same way that the land surface of the world is divided. . . . The principle of sovereign control of the seas . . . works against too many maritime interests of too many maritime nations and is simply unacceptable to them."⁵⁰

If the interpretation herein given to these new developments proves to be a correct one, the world can look forward to more and more coöperation among governments in the investigation and regulation of the food resources of the high seas *within the framework of international law*, by means of international agreements, to the end that the peoples of the world may be benefited by being provided with the maximum yield of food from the fishery resources of the international common.

⁵⁰ "United States Policy on High Seas Fisheries," *loc. cit.*, p. 71.

THE VENEZUELA-BRITISH GUIANA BOUNDARY ARBITRATION OF 1899

BY CLIFTON J. CHILD

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In his note on "The Venezuela-British Guiana Boundary Dispute," (this JOURNAL, Vol. 43 (1949), pp. 523-530), Judge Otto Schoenrich publishes a memorandum by the late Severo Mallet-Prevost which, if it were the only evidence upon which the fairness of the arbitration of 1899 could be judged, would bring the justice of the award seriously into question. Fortunately, however, it is not necessary to rely either upon the recollections of Mr. Mallet-Prevost or upon the construction placed upon these and other facts relating to the boundary dispute by Judge Schoenrich in order to learn the truth of how the Tribunal came to make its award. There are the voluminous files of the British Foreign Office on the arbitration to which reference may be made¹ and there is the verbatim record of the Tribunal, taken down by six shorthand writers, printed day by day as the Tribunal sat, and then issued in 54 parts. There are also the files—often most informative—of contemporary newspapers (for the arbitration took place at the French Ministry of Foreign Affairs under the watchful eye of the press).

It was perhaps only to be expected that some day, after turning the matter over in his mind for so long, Mr. Mallet-Prevost would eventually produce a theory to justify the attack which he and General Harrison, the senior Counsel for Venezuela, launched upon the Tribunal immediately after the award was announced on October 3, 1899.² On that occasion Mr. Mallet-Prevost and General Harrison made a statement to Reuter's correspondent which, after claiming "victory" for Venezuela in terms which will be referred to later in this paper,³ concluded as follows:

The President of the Tribunal . . . had in his closing address today commented on the unanimity of the present judgment and referred to it as a proof of the success of the arbitration. It did not, however, require much intelligence to penetrate behind this superficial statement and see that the line drawn was a line of compromise and not a line of right. If the British contention had been right, the line should

¹ The Foreign Office papers on the Arbitration of 1899 in the Public Record Office, London, fill 15 bound volumes. They are FO 80: 411-424 inclusive, and FO 80: 474.

² The award was announced on Oct. 3, and not on the 4th, as stated by Judge Schoenrich.

³ See below, p. 691.

have been drawn much further west. If it had been wrong, then it should have been drawn much further east. There was nothing in the history of the controversy, nor in fact in the legal principle involved, which could adequately explain why the line should be drawn as it was now found. So long as arbitration was to be conducted on such principles it could not be regarded as a success, at least by those who believed that arbitration would result in an admission of legal rights and not in compromises really diplomatic in their character. Venezuela had gained much, but she was entitled to much more, and if the arbitrators were unanimous it must be because their failure to agree would have confirmed Great Britain in the possession of even more territory.⁴

In view of the charges which have now been ventilated in Mr. Mallet-Prevost's memorandum, the language of this attack is significant. For it will be noted that, although he and General Harrison did not spare the Tribunal, nor, indeed, the two American judges who were members of it, the only suggestion of impropriety which they made in connection with the award was that it was essentially a compromise, rather than the admission of right on the part of one side or the other, and that it consequently deprived Venezuela of territory to which her Counsel (naturally enough) believed her to be legally entitled. There was no complaint that this compromise resulted from undue pressure upon the judges by the Russian President of the Tribunal, M. de Martens, or from a "deal" between Russia and Great Britain, as alleged in Mr. Mallet-Prevost's memorandum. Nor was there any appeal to the American judges, as there might reasonably have been, if Mr. Mallet-Prevost's present charge is true, to enter a protest against the false position in which they had supposedly been placed by the President of the Tribunal and to let it be known that, if they had concurred in the unanimous award of the Tribunal, they had done so against their own better judgments.⁵ In fact, apart from the resentment which the Counsel for Venezuela apparently felt against the verdict, there were none of the elements of the story as Mr. Mallet-Prevost now tells it—a circumstance which makes it tempting to assume that, in nursing his grievance against the Tribunal through the years, Mr. Mallet-Prevost allowed his imagination to supply a number of details which were missing from the statement which he and General Harrison made in 1899.

This was not the only extent to which the picture apparently changed in Mr. Mallet-Prevost's mind between 1899 and 1944, when he dictated his statement; and thus, before proceeding to examine his principal allegation regarding the "deal" between Great Britain and Russia, it becomes necessary to consider some of the major errors which he allowed to creep into

⁴ The Times (London), Oct. 4, 1899, p. 6.

⁵ So far from entering such a protest, Justice Brewer went on record with the statement, which Judge Schoenrich himself quotes, to the effect that all the arbitrators had differing views as to where the true boundary should be drawn, etc.

the story and, above all, to call attention to the tricks which his memory apparently played with the facts which he adduces in support of his statement.

The first error in Mr. Mallet-Prevost's account relates to the rôle of Lord Chief Justice Russell, one of the British judges, in the arbitration. After recording the conversation which he had with Lord Russell at dinner in January, 1899, Mr. Mallet-Prevost observes that, from that moment, he knew that he "could not count upon Lord Russell to decide the boundary question on the basis of strict rights." The fact is, however, that, in January, 1899, when Mr. Mallet-Prevost dined with him, the Lord Chief Justice was in no way connected with the boundary dispute and had no prospect of being involved in the arbitration. At that time the arbitrators were M. de Martens, Chief Justice Fuller, Justice Brewer, Lord Justice Collins and Lord Herschell—as provided for in Article II of the Anglo-Venezuelan Treaty of February 2, 1897. As the first British arbitrator nominated by the Judicial Committee of the British Privy Council, again in accordance with Article II of the Treaty, Lord Herschell was, in January, 1899, actively concerned with the preliminaries of the arbitration, although he was prevented by other business (as was Chief Justice Fuller) from attending the brief and formal first meeting of the Tribunal on January 25. And it was only with his sudden death, after a fall in the street in Washington, D. C. on March 1, 1899 (*i.e.*, two months after Mr. Mallet-Prevost's conversation with Lord Russell), that it became necessary to bring in another arbitrator to replace him. It was then, and only then, that Lord Russell became involved in the arbitration, and it is consequently sheer nonsense for Mr. Mallet-Prevost to suggest that, from the moment when he dined with the Lord Chief Justice in January, he knew that he could not count upon the latter to be fair, and for Judge Schoenrich to adduce this "circumstance" as having led Mr. Mallet-Prevost to the opinion that a "deal" was concluded behind the scenes between Great Britain and Russia.

In the case of Lord Justice Collins, the other British arbitrator, Mr. Mallet-Prevost's memory seems to have been equally at fault. Of Lord Justice Collins Mr. Mallet-Prevost says that, at first, "his whole attitude and the numerous questions which he asked were critical of the British contentions and gave the impression that he was leaning toward the side of Venezuela"; and that, after the "short two weeks holiday" of the Tribunal (when he and Lord Russell allegedly took the President of the Tribunal with them to England and when the "deal" between Great Britain and Russia was allegedly concluded) the "change in [him] was noticeable," *i.e.*, "he asked very few questions and his whole attitude was entirely different from what it had been."

Now, as Mr. Mallet-Prevost must have known in 1899, even though he apparently overlooked the fact later, every word spoken by Lord Justice

Collins as long as he sat on the Tribunal, and every word spoken by every other judge and counsel participating in the arbitration, was entered in the verbatim record which was printed at the end of each day's proceedings; so that, had Mr. Mallet-Prevost checked his statement against the record, the following facts could not possibly have escaped his notice:

1. Taking his recorded remarks as a whole, Lord Justice Collins gave no tangible indication that he was "leaning toward the side of Venezuela" or, indeed, toward the side of Great Britain, either before or after the crucial recess. He allowed Lord Russell to do the greater part of the questioning during Sir Richard Webster's opening speech for Great Britain (June 15-July 13). He followed Mr. Mallet-Prevost with a number of critical questions and observations during the latter's opening speech for Venezuela (July 21-August 10), mildly rebuking him on July 24 for the manner in which he presented his evidence.⁶ He gave the same alert attention to the ensuing speeches (Mr. Soley, August 12-29; Sir Robert Reid, August 30-September 4; Mr. G. R. Askwith, September 5-7; General Tracy, September 7-15; Sir Richard Webster, September 15-19; and General Harrison, September 19-27). He questioned the British Counsel, Sir Robert Reid and Mr. Askwith, as frequently as he questioned General Tracy, with whom he had long exchanges on September 12 over the latter's interpretation of the Treaty of Münster.⁷ Both he and Lord Russell continued to put searching questions to Sir Richard Webster during the latter's summing up.⁸ On the other hand, his interruptions during General Harrison's final speech were on the whole not unhelpful to the latter in rounding off the case for Venezuela.

2. Lord Justice Collins' questions and interjections varied in number from 0 to 30 per session before the recess, except on July 31 and August 3, when they numbered 36 and 72 respectively (during Mr. Mallet-Prevost's own speech). They varied from 0 to 29 per session after the recess, the total reaching 29 during the first session after the recess, when the change in him would presumably have been most noticeable had he suddenly become "taciturn and listless" (as Judge Schoenrich puts it).

3. After the recess, as indeed before, Lord Justice Collins tended to ask as many questions as Chief Justice Fuller and Justice Brewer, who were presumably not "taciturn and listless."

Apart from these errors in regard to the rôles of Lord Russell and Lord Justice Collins, there are minor misstatements of fact in Mr. Mallet-Prevost's narrative which also show how badly his memory must have served him. For instance, he states that after he and Sir Richard Webster had concluded their speeches "the Tribunal adjourned for a short

⁶ Seventeenth Day's Proceedings, Meeting of July 24, p. 993.

⁷ Forty-Fourth Day's Proceedings, Meeting of September 12, pp. 2556-2560.

⁸ They were often more searching than those put by Chief Justice Fuller and Justice Brewer.

two weeks holiday." Now had he deemed it worth his while to refresh his recollection by reference to the printed record, Mr. Mallet-Prevost would have been reminded that the Tribunal did not adjourn after hearing Sir Richard Webster and himself, but went straight on to hear the "argument" of Mr. Soley. It was then, in the very middle of Mr. Soley's "argument," that the Tribunal did adjourn, but only for nine days (August 16-25), and not for "two weeks," as stated by Mr. Mallet-Prevost. (This was only one of the Tribunal's ten adjournments, but as it was the longest, although not by very much, we must assume that it was the one which Mr. Mallet-Prevost had in mind.)⁹

As for Mr. Mallet-Prevost's cardinal allegation that a "deal" was concluded between Great Britain and Russia in 1899 to decide the arbitration in the manner described in his statement, it ought perhaps in the first place to be pointed out that the very suggestion that the British felt it necessary to negotiate such a "deal" implies that by the end of Mr. Mallet-Prevost's speech the proceedings were going so badly for them that they felt that they had to resort to subterfuge in order to make their position more secure. The fact is, however, that Mr. Mallet-Prevost's case gave the British no cause for anxiety. At one stage in his "argument" the President of the Tribunal had felt constrained to suggest to him that, in the interest of brevity, he might make certain changes in his method of presenting his evidence;¹⁰ and, after he wound up on August 10, the British Agent, Mr. George W. Buchanan, was able to report to Lord Salisbury that the Tribunal had not, in his opinion, been very profoundly impressed by his performance. He wrote:

The speech which Mr. M-P thus brought to a close has not, I believe, made any real impression on the Tribunal. It has attacked the British position too much in detail, and any success which he may have obtained has been of a purely negative character.¹¹

Nor did Mr. Buchanan feel at any time that the case was going badly for Great Britain. On the contrary, he continued to send in optimistic reports throughout the proceedings. At the end of Mr. Soley's speech he thought that the Tribunal was impressed by the fact that Point Barima lay within the British sphere of influence.¹² He considered that General

⁹ The Tribunal had to take three long recesses in June and early July in order to permit M. de Martens to attend the First Hague Conference.

¹⁰ Cf. the remarks by the President and other members of the Tribunal, in *Twentieth Day's Proceedings*, Meeting of July 31, pp. 1213 ff.

¹¹ Mr. Buchanan to Lord Salisbury, No. 81 of August 10, 1899, in *FO 80*: 420. Venezuela, Guiana Boundary Arbitration (Archives), Drafts 1-82, January-August 12, 1899.

¹² Mr. Buchanan to Lord Salisbury, No. 104 of August 29, 1899, in *FO 80*: 421. Venezuela, Guiana Boundary Arbitration (Archives), Drafts Nos. 83-169, August 13-January 4, 1900.

Tracy,¹³ who had "wearied his listeners by reading out a written speech full of endless repetitions," had "made no impression whatsoever on the Tribunal";¹⁴ and of General Harrison's final speech he wrote:

In spite of the force and eloquence with which General Harrison has supported the contention that Venezuela as successor to Spain is invested with a prior and paramount title to the territory in dispute, the speech which he has today brought to a close has, I think, failed to make any serious impression on the Tribunal.¹⁵

It is consequently not surprising, perhaps, to find that, in the fifteen bound volumes of British Foreign Office papers relating to the arbitration¹⁶ and in the almost equally voluminous dispatches and telegrams which passed between London and St. Petersburg during this period¹⁷ there is not one single document which by the widest stretch of the imagination could be considered to indicate a "deal" between Great Britain and Russia of the sort suspected by Mr. Mallet-Prevost.

How, in any case, do the steps which were allegedly taken to conclude that "deal" during the crucial recess of the Tribunal in August fit in with what is otherwise known of the movements of the leading figures in the drama? If we are to believe Mr. Mallet-Prevost, "the two British arbitrators returned to England" during the recess "and took Mr. Martens with them." In the case of Lord Russell the first part of this statement is certainly true, for there is confirmation in the London *Times* of August 18, 1899, Court Circular (page 4), that "the Lord Chief Justice (Lord Russell of Killowen) returned from Paris yesterday to his country house, Tadworth Court, near Epsom." There is, however, no mention of the movements of Lord Justice Collins. Nor is it recorded that M. de Martens accompanied Lord Russell. In fact there is no mention of M. de Martens having visited Great Britain at all, although M. de Martens was very much in the public eye at the time, not only as President of the Tribunal, but as a prominent figure at the First Hague Conference; so that it seems hardly likely that the *Times* would have ignored him if it had been known that he was returning with Lord Russell.¹⁸ The absence of any mention

¹³ Whom Judge Schoenrich erroneously describes as an "ex-Secretary of War." He was, as is well known, an ex-Secretary of the Navy.

¹⁴ Mr. Buchanan to Lord Salisbury, No. 131 of September 15, 1899, in *FO 80*: 421.

¹⁵ Mr. Buchanan to Lord Salisbury, No. 156 of September 27, 1899, *ibid.*

Mr. James C. Tilley, Mr. Buchanan's assistant, wrote in a somewhat lighter vein: "General Harrison is very good in his own style, which includes a good deal of furniture smashing, but I do not think that he is good enough to turn the scale." Mr. Tilley to Mr. Cartwright of September 20, 1899, in *FO 80*: 419. Venezuela, Guiana Boundary Arbitration (Various), June-December, 1899.

¹⁶ *FO 80*: 411-424 and 474.

¹⁷ *FO 65*: 1579-1582, Russia.

¹⁸ On August 23 (Court Circular, p. 7) the *Times* reported that "Lord Russell of Killowen has left London for Paris," but again there was no mention of M. de Martens or Lord Justice Collins.

of the movements of Lord Justice Collins is also remarkable because there is a full account of the movements of the others concerned in the arbitration. For instance, the *Times* of August 19 (Court Circular, p. 7) reported that Sir Robert Reid, one of the Counsel for Great Britain, had "returned to his country house at Kingsdown, near Walmer, from Paris"; and the *Times* of August 18 (Court Circular, p. 4) likewise reported that the Attorney General, Sir Richard Webster, had "left Paris for Switzerland for a short holiday."¹⁹

But supposing that M. de Martens was taken to England unnoticed by the press in order to participate in a "deal" between Great Britain and Russia, is it likely that the leading British Counsel and the Law Officer of the British Crown most intimately concerned with the handling of the British case—Her Majesty's Attorney General—would have chosen this particular moment to go off in the opposite direction to Switzerland for a holiday? And would Lord Salisbury, who was following the proceedings with the utmost interest, also have chosen this particular time to retire to Walmer Castle in order to be with the Marchioness (then recovering from a serious illness),²⁰ so that he was right out of the picture until the Queen summoned him to Osborne on August 24?²¹

Had Mr. Mallet-Prevost reflected for a moment upon the state of relations between Great Britain and Russia in the summer of 1899 he must inevitably have realized how difficult, if not impossible, from a political point of view, a "deal" between the two countries would have been. One agreement—the Exchange of Notes of April 28, 1899, defining spheres of influence for the construction of railways in China²²—had admittedly been reached earlier in the year, but this had done so little to relieve the tension between the two countries in the Far East that this was still at its height when Mr. John Hay, the United States Secretary of State, stepped in to proclaim his "Open Door" policy. Such, indeed, were the relations between Great Britain and Russia in the summer of 1899 that the First Secretary at the German Embassy in St. Petersburg, von Tschirschky, was constrained to report:

I do not believe that there is scope within the framework of Russian policy—or, as far as I can imagine, within that of English policy—[for the two countries] to reach agreement and bind themselves in writing on general political questions of this nature. Moreover, it seems to me that the basis for such an agreement between these States is lacking because, in view of the inability of Russia in practice to

¹⁹ On August 23 (Court Circular, p. 7) the *Times* reported that "the Attorney-General (Sir R. Webster) and Sir Robert Reid, Q.C., M.P., have both returned to Paris for the Venezuelan arbitration." Again there was no mention of M. de Martens or Lord Justice Collins.

²⁰ The *Times*, Aug. 16, Court Circular, p. 7.

²¹ *Ibid.*, Aug. 25, Court Circular, p. 7.

²² British and Foreign State Papers, 1898-1899, Vol. XCI, pp. 91 ff.

oppose British claims to the Persian Gulf, Russia's undertaking to give up her own pretensions to the Persian Gulf would have little value for England.²³

Nor did the attitude adopted by the Russians in the Transvaal crisis bring any improvement in the situation. Indeed, so violent were the pro-Boer outbursts in the Russian press that the British Chargé d'Affaires at St. Petersburg, Mr. Charles Hardinge, was moved, on October 18, 1899, to write a long and impassioned despatch to Lord Salisbury, drawing the British Foreign Secretary's attention to the "bitterness and hostility" which was being displayed towards Great Britain, and pointing out that, in view of the control normally exercised over the Russian editors, these were undoubtedly receiving official blessing and support.²⁴

If, therefore, there is no real evidence of a "deal"—and, indeed, no conceivable basis for one—between Great Britain and Russia on the Venezuelan Boundary question, how in fact are the peculiar circumstances which Mr. Mallet-Prevost seeks to attribute to the award to be explained? Is it not necessary here to take into account the attitude of the President of the Tribunal, whose desire to have a unanimous award seems to provide the key to the whole situation? Indeed, was it not M. de Martens' desire for unanimity which caused him, in bringing both parties to accept a compromise, to put pressure upon the British judges, as well as upon their American colleagues? And did he not thereby sacrifice the British "right" to a boundary starting at Point Barima and following the Schomburgk line, just as much as he sacrificed the Venezuelan "right" to a boundary starting at the Moruca River? Surely if M. de Martens' sole concern had been to accommodate the British, who clearly at no stage in the arbitration cared whether the final decision was to be unanimous or not,²⁵ he would have voted with Lord Russell and Lord Justice Collins (assuming, that is, that both favored the British claim) in support of the

²³ "Aufzeichnung des Ersten Sekretärs bei der Botschaft in Petersburg von Tschirschky, St. Petersburg den 3. Juli 1899," in *Die Grosse Politik der Europäischen Kabinette 1871-1914*, Vol. 14, Pt. 2, pp. 556-557.

²⁴ Cf. FO 65: 1580, Russia, etc. A few days later the German Chargé d'Affaires, von Tschirschky, likewise felt it necessary to report to his government on the anti-British feeling which the Boer crisis had engendered among the Russians. Cf. "Der Geschäftsträger in Petersburg von Tschirschky an den Reichskansler von Hohenlohe, St. Petersburg den 30. Oktober 1899" in *Die Grosse Politik*, Vol. 15, pp. 408 ff. For further examples of anti-British feeling among Russians on the Boer question, cf. the despatches of Maximov and Müller in "Anglo-burskaya voina v donoseniyakh russkovo voennovo agenta" in *Krasny Arkhiv*, /6 (103)/ Moscow, 1940, pp. 130-159.

²⁵ Nor was there anything in the Rules of Procedure of the Tribunal which pointed to the desirability of the award being unanimous. On the contrary, Art. XX of the Rules provided for the possibility of a "minority of members of the Tribunal" refusing to sign the award by stipulating that such a refusal should be "duly noted in the Report of the Proceedings." Cf. Rules of Procedure in FO 80: 412, Venezuela, Guiana Boundary Arbitration, etc.

full Schomburgk line, thereby overruling Chief Justice Fuller and Justice Brewer, who allegedly preferred a line beginning at the Moruca River.²⁶

The thoughts which were uppermost in M. de Martens' mind as the Tribunal reached its final verdict are patent from the speech which he delivered after announcing the award on October 3, 1899—a speech which is recorded verbatim in "Protocol No. 56" of the Tribunal. In that speech the President devoted the emphasis of his remarks to the place which he thought the arbitration might have in the development of international law and to the significance which he attached to the Tribunal's unanimity; and from this it becomes clear how much he himself had labored to secure that unanimity. If, he pointed out, one recalled the cases submitted to international arbitration from the *Alabama Case* of 1873 to the *Bering Sea Fisheries* dispute of 1893, one saw that the awards were always rendered by a majority vote, and that there were always dissenting opinions among the arbitrators. In the Venezuela-British Guiana Boundary Arbitration, however, the parties had had "the satisfaction of having unanimity among the arbitrators on all sections of the award, without any reservation whatsoever." This unanimity was the paramount achievement of the present Tribunal. "*C'est un fait qu'il est nécessaire d'affirmer et de*

²⁶ It ought perhaps to be noted here, if only in fairness to the judges, that we have only Mr. Mallet-Prevost's word for it that the Tribunal divided as he states; i.e., that the two British arbitrators were disposed to award Great Britain all the territory east of the Schomburgk line, starting from Point Barima on the coast, and that the two American arbitrators, on the other hand, favored a boundary which would start at the Moruca River and give Venezuela all the territory west of this. This simple division between the judges does not accord with the statement of Mr. Justice Brewer's which Judge Schoenrich himself quotes in his note (although the fact apparently escapes Judge Schoenrich's notice). According to Justice Brewer, if any of the judges had been asked to give an award "*each would have given one differing in extent and character.*" In other words, there were not *two* conflicting views as to where the boundary ought to be drawn, but *four or even five*. Consequently, as Justice Brewer observes, the judges had to "*adjust*" their differing views and "*finally draw a line running between what each thought was right.*" (Italics added.) Nor does Justice Brewer suggest that there was any pressure brought to bear upon him to acknowledge a decision in which he did not concur. On the contrary, he states that "*it was only by the greatest conciliation and mutual concession that a compromise was arrived at.*" (Italics added.) This was presumably a source, not of resentment, but of satisfaction to him in that, as he himself states, he had believed until the last moment that a decision would be quite impossible. The implication of Mr. Mallet-Prevost's statement that the British judges were more anxious to secure a decision favorable to Great Britain than to see that justice was done to both sides, is not in any way borne out by remarks which Justice Brewer let fall to Mr. George W. Buchanan, the British Agent. In the course of a conversation with Mr. Buchanan on July 23, 1899, Justice Brewer apparently "*expressed great admiration for the impartial and strict sense of justice shown by the British arbitrators during the proceedings of the Tribunal, adding that he hoped that the Court would not find it difficult to agree as to the award.*" (Mr. Buchanan to Lord Salisbury, No. 52 of July 24, 1899, in *FO 80*: 420, Venezuela, Guiana Boundary Arbitration, etc.)

proclamer, c'est un idéal vers lequel il faut tendre. . . . La force morale d'une Sentence Arbitrale unanime est d'une valeur incalculable."²⁷

In view of Judge Schoenrich's contention that "the award created general surprise and disappointment" and that "students of the Venezuelan side of the controversy were shocked at the excessive grant of territory to British Guiana, it may be worth while, in conclusion, to consider some of the contemporary reactions to the verdict of the Tribunal.

At the beginning of their interview with Reuter's correspondent already quoted, Mr. Mallet-Prevost and General Harrison spoke of the award as a "victory" for Venezuela. They stated:

Within the Schomburgk line lay the Amakuru River and Point Barima, the latter forming the southern entrance to the great mouth of the Orinoco. No portion of the entire territory possessed more strategic value than this, both from a commercial and a military standpoint, and its possession by Great Britain was most jealously guarded. This point had been awarded to Venezuela, and along with it a strip of coast about 50 miles in length, both giving to Venezuela the entire control of the Orinoco River. In the interior another long tract to the east of the Schomburgk line, some 3,000 square miles in extent had also been awarded to Venezuela, and thus, by a decision in which the British arbitrators had themselves concurred, the position taken up by the British Government until 1895 had been shown to be without foundation. This in no way expressed the extent of Venezuela's victory. Great Britain had put forward a claim to more than 30,000 square miles of territory west of the Schomburgk line, and it was this territory which in 1890 she was disposed to submit to arbitration. Every foot of this territory had been awarded to Venezuela.²⁸

In a despatch to Lord Salisbury, in which he was at pains to explain, *inter alia*, why the full British claim had not been recognized, Mr. George W. Buchanan, the British Agent, reported that the result

may, I think, be considered highly satisfactory, more especially as it has been arrived at by a unanimous decision of the Tribunal of Arbi-

²⁷ In an interview with Reuter's correspondent after the award had been announced on Oct. 3, M. de Martens, after repeating what he had told the Tribunal about the significance of the unanimity of the judges, added: "The boundary line which has been laid down by the judges is a line based on justice and law. The judges have been actuated by a desire to establish a compromise in a very complicated question, the origin of which must be looked for at the end of the 15th century." *Cf.* London Times, Oct. 4, 1899, p. 6.

²⁸ The Times, Oct. 4, 1899, p. 6. It is surely not without significance that the official Russian *Bolshaya Sovetskaya Entsiklopediya* (Moscow, 1928), Vol. X, p. 170, also speaks of "the judgment being substantially in favor of Venezuela." By the time this article was written an intensive study of the Imperial Russian archives had been made, so that, had there been any evidence to suggest that the Tribunal of Arbitration was improperly influenced in favor of Great Britain, the writer of the article would certainly have drawn attention to it.

tration. No serious British interests have been sacrificed, though it would no doubt have been more satisfactory had the mouth of the Barima been left in the absolute possession of Great Britain. . . .²⁹

From Caracas the British Minister, Mr. W. H. D. (afterwards Sir W.) Haggard, reported to Lord Salisbury on October 7, 1899, that:

The news of the decision of the Guiana Boundary Commission has been received here with the greatest apparent indifference by the public. It is hardly even a matter of comment, and with the exception of an article in the semi-official paper, I have not as yet seen any newspaper article on the subject. I have, on the other hand, been told privately by Venezuelans of education that they regretted extremely that Barima has been awarded to them as now they can never hope for the wealth and prosperity of the region of the Orinoco which would have resulted from that river being open to our commercial influence. . . . Thoughtful Venezuelans realise that they have gained a tract of land which will be of no more value to them than the many thousand square miles of unoccupied wilderness which they now possess; whereas, had this been in English hands, they would have indirectly benefited to a large extent by the settled, orderly government and consequent prosperity of their neighbour—from proximity to whom they will now continue to be to a great extent cut off.³⁰

On October 19 the Minister added that more accurate information on the nature of the award from English and American sources had "made no change in the indifference and apathy of the public here towards the whole question"; and he went on to draw the attention of the Foreign Office to an editorial which had appeared in the *Tiempo*, the leading newspaper in Caracas, as confirming, notwithstanding its "notoriously anti-English bias," the impressions which he had conveyed to Lord Salisbury.³¹

The course of the Venezuela-British Guiana Boundary controversy had been followed with great interest, and, in the case of Mr. Cleveland, with much anxiety, by successive Presidents of the United States. It had been the good offices of President Cleveland which had prepared the way for the Treaty of 1897 and thereby helped to bring the dispute to arbitration in 1899; and it was his successor, President McKinley, who, of all heads of

²⁹ Mr. Buchanan to Lord Salisbury, No. 164 of October 3, 1899, in *FO 80*: 417, Venezuela, Guiana Boundary, etc.

³⁰ Mr. Haggard to Lord Salisbury, No. 124 of October 7, 1899, in *FO 80*: 419.

³¹ After alluding with great bitterness to various unsavory aspects of Venezuelan political life at the time the article concluded: "Señores Jueces: ¿Hemos nosotros de confiar á sangre fría la suerte de unos millares de hombres industriuosos y de unos centenares de leguas de incalculable riqueza á Venezuela con preferencia á la Gran Bretana que ya ha establecido dominio sobre ese territorio?"

"¿Hemos de salvar para la civilización este nuevo imperio, ó volverlo al estado en que se encuentra desde el descubrimiento de América, ensanchando con ello las fronteras de la semi-civilización y aumentando el número de reclutables?"

"Decided vosotros, honorable colegas. Yo voto por la Gran Bretana." Cf. Mr. Haggard to Lord Salisbury, No. 132 of October 19, 1899, and enclosures in *FO 80*: 419.

state whose own national interests were not immediately concerned, had probably taken the greatest pains to ensure that the arbitration was successful. For that reason it is perhaps not inappropriate to refer in conclusion to the observations on the award which President McKinley addressed to Congress in his Message of December 5, 1899. For the opinion delivered in that Message was presumably not formed without careful consideration of all the facts relating to the arbitration. After stating that:

The International Commission of Arbitration, appointed under the Anglo-Venezuelan treaty of 1897, rendered an award on October 3rd last, whereby the boundary line between Venezuela and British Guiana is determined, thus ending a controversy which has existed for the greater part of the century,

the President observed that:

The award, as to which the arbitrators were unanimous, while not meeting the extreme contention of either party, gives to Great Britain a large share of the interior territory in dispute and to Venezuela the entire mouth of the Orinoco, including Barima Point and the Caribbean littoral for some distance to the eastward.

The decision, he concluded, "appears to be equally satisfactory to both parties."³²

³² James D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, Vol. XIV, p. 6380.

NOTES ON LEGAL QUESTIONS CONCERNING THE UNITED NATIONS

BY YUEN-LI LIANG *

ABSTENTION AND ABSENCE OF A PERMANENT MEMBER IN RELATION TO THE VOTING PROCEDURE IN THE SECURITY COUNCIL

According to Article 27, paragraph 3, of the Charter of the United Nations, decisions of the Security Council on non-procedural matters shall be made by an affirmative vote of seven members "including the concurring votes of the permanent members." The same paragraph further states that in decisions under Chapter VI (Pacific Settlement of Disputes), and under paragraph 3 of Article 52 (pacific settlement of local disputes through regional arrangements or by regional agencies), a party to a dispute shall abstain from voting. While it is agreed that when a permanent member is a party to a dispute its compulsory abstention should not be considered as a veto in substantive decisions of the Security Council,¹ it is not clear from the wording of Article 27 or of the Rules of Procedure of the Security Council whether a voluntary abstention by a permanent member which is not a party to a dispute has the same effect as a compulsory abstention.

A second problem which is closely related to the problem of abstention and on which the Charter is also silent is that of absence. Can the absence of a permanent member prevent a decision on a non-procedural matter from being adopted by the Security Council? Should absence be considered as having the same effect as an abstention?

1. DISCUSSIONS IN SAN FRANCISCO CONFERENCE IN REGARD TO VOLUNTARY ABSTENTION

When the Charter was being drafted at the San Francisco Conference, the consideration of the structure and functioning of the Security Council was entrusted to Committee 1 of Commission III. At the twentieth meeting of the Committee, when Section C, Chapter IV of the Dumbarton

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¹ See statement of the United States delegate on June 16, 1945, in Committee III/1 of the San Francisco Conference, U.N.C.I.O. Docs., III/1/55, Vol. 11, p. 611; statement of Senator Tom Connally in Hearings before the Committee on Foreign Relations, U. S. Senate, 79th Cong., 1st Sess., p. 265; for comments, see Yuen-li Liang, "The Settlement of Disputes in the Security Council: The Yalta Voting Formula," *British Year Book of International Law*, Vol. 24 (1947), p. 358.

Oaks Proposals on the voting procedure in the Security Council was under discussion, several delegations raised the problem of the effect of abstention by permanent members. The representative of El Salvador repeated a question previously asked of the sponsoring governments as to whether abstention would be considered as an exercise of the veto.² The delegate of Canada submitted two amendments, one of which would have the decisions of the Security Council on matters other than procedural ones made by "an affirmative vote of at least two thirds of the members present and voting, including the concurring votes of the permanent members present and voting."³

At an earlier date, a list of questions concerning the exercise of the veto in the Security Council had been submitted to the delegations of the sponsoring governments by the other delegations. One of the questions thus raised read: "If a motion is moved in the Security Council on a matter, other than a matter of procedure, under the general words in paragraph 3, would the abstention from voting of any one of the permanent members of the Security Council have the same effect as a negative vote by that member in preventing the Security Council from reaching a decision in that matter?"⁴ The Statement on Voting Procedure in the Security Council issued at San Francisco by the four sponsoring governments, in consultation with France, contained no answer to this question.⁵ The Canadian amendment referred to above was later withdrawn and paragraph 3 of Article 27 was adopted by the Committee in its present form.

The question of the effect of voluntary abstention was thus left obscure and subject to interpretation. Writing at a time when the practice of voluntary abstention had not yet been developed in the United Nations, some authors held the view that the requirement of "*the concurring votes* of all permanent members" could hardly be interpreted in any other way than that, in the absence of affirmative votes cast by all the five permanent members, a decision on a non-procedural matter could not be taken by the Security Council.⁶ In other words, the veto power could be exercised by

² U.N.C.I.O. Docs., III/1/48, Vol. 11, p. 513.

³ *Ibid.*, p. 515.

⁴ Doc. III/1/B/2(a), *ibid.*, p. 707.

⁵ According to an unofficial report, this question was discussed by the four sponsoring governments and France in the Committee of Five which prepared the Statement on Voting Procedures, and the Committee decided to answer it in the affirmative. On the other hand, the Committee agreed that when a permanent member was a party to a dispute, its abstention would not prevent the Security Council from reaching a decision on a non-procedural matter. See Wellington Koo, Jr., *Voting Procedures in International Political Organizations* (1947), p. 156.

⁶ See Hans Kelsen, "Organization and Procedure of the Security Council," *Harvard Law Review*, Vol. 59, No. 7 (1946), pp. 1098-1099; Goodrich and Hambro, *The Charter of the United Nations: Commentary and Documents* (1946 ed.), p. 133 (This categorical

any one of the five permanent members not only by a negative vote but also by absenting itself or by abstaining from voting. This view, however, was not substantiated by the developments in the Security Council.

2. VOLUNTARY ABSTENTION IN THE PRACTICE OF THE SECURITY COUNCIL

From the first meeting to the four hundred and fifty-eighth meeting of the Security Council (January 17, 1946, to December 29, 1949), a total number of 199 decisions were taken.⁷ This excludes all the proposals which failed of adoption either because they fell short of the requisite seven affirmative votes or because one or more of the permanent members cast negative votes on substantive proposals. It is important to note that no substantive proposal was ever defeated because a permanent member abstained from voting. Out of the 199 decisions or resolutions adopted by the Security Council, approximately one-fourth dealt with substantive matters; and out of these decisions nearly four-fifths were taken with one or more permanent members abstaining.

Most of these approximately forty decisions in which a permanent member abstained were passed unchallenged. On a number of occasions, a permanent member which abstained from voting explained that it would abstain rather than cast a negative vote to defeat the motion before the Security Council. On several occasions, doubts were raised by certain delegations as to the effect of voluntary abstention by a permanent member; the expression of such doubts, however, did not result in invalidating a decision.

The first case in which views were expressed in the Security Council concerning the effect of voluntary abstention was the Spanish Question. At the 39th meeting of the Security Council, on April 29, 1946, a draft resolution was submitted by Australia proposing the appointment of a sub-committee to study and report on the Spanish Question. The representative of the Soviet Union, Mr. Gromyko, expressing dissatisfaction with this draft resolution, abstained from voting and expressed his position as follows:

. . . bearing in mind, in this connection, that my voting against the Australian draft resolution would make its adoption impossible, I shall abstain from voting.

I consider it necessary to draw the attention of the Security Council to the fact that my abstention from voting on this matter may in no

position was modified in the second edition, published in 1949, which referred only to the practice of not counting abstentions as negative votes; see p. 223). As late as 1948, Norman J. Padelford expressed the same point of view in his article: "The Use of the Veto," *International Organization*, Vol. II, No. 2 (June, 1948), p. 245.

⁷ This figure is taken from U.N. Docs. A/INF/2 and S/INF/3. It is to be noted that from the first to the forty-eighth meetings, the records of the Security Council did not show the names of its members which voted or abstained from voting.

way be regarded as a precedent capable of influencing in any way the question of the abstention of permanent members of the Security Council.⁸

The United States representative, Mr. Stettinius, reserved the position of his government on the statement made by Mr. Gromyko and declared that with that understanding he was "prepared to agree that Mr. Gromyko's abstention should not create a precedent for the future."⁹

Thereafter, a few clearly substantive resolutions were adopted by the Security Council with one or more permanent members abstaining. Among these decisions may be mentioned the substantive paragraphs in the resolution on the establishment of a Commission of Investigation concerning the Greek Frontier Incidents,¹⁰ the approval of certain articles of the terms of trusteeship for the Pacific Islands formerly under mandate to Japan,¹¹ and the recommendation to refer the Corfu Channel Dispute to the International Court of Justice.¹²

The practice of not treating abstention as a negative vote received an emphatic confirmation at the 173rd meeting of the Security Council on August 1, 1947. After a resolution on the Indonesian Question was adopted which called upon the parties to cease hostilities and to settle their disputes by arbitration or by other peaceful means, and after the representative of the United Kingdom explained that he did not wish his abstention to be treated as a veto, invalidating the resolution which otherwise had secured the requisite majority, the President of the Council (the representative of Syria) made the following statement:

I think it is now jurisprudence in the Security Council—and the interpretation accepted for a long time—that an abstention is not considered a veto, and the concurrent votes of the permanent members mean the votes of the permanent members who participate in the voting. Those who abstain intentionally are not considered to have cast a veto. That is quite clear.¹³

⁸ Security Council, Official Records, 1st Year, 1st ser., No. 2, p. 243. For a discussion of the nature of this resolution, see Yuen-li Liang, *loc. cit.* (note 1, *supra*), pp. 358–359.

⁹ Security Council, Official Records, 1st Year, 1st ser., No. 2, p. 245.

¹⁰ *Ibid.*, 1st Year, 2nd ser., No. 28, p. 699 (December 19, 1946).

¹¹ *Ibid.*, 2nd Year, No. 31, p. 680 (April 2, 1947).

¹² *Ibid.*, No. 34, p. 727 (April 9, 1947).

¹³ *Ibid.*, No. 68, pp. 1711–1712. At the 56th meeting of the Security Council, on Aug. 29, 1946, when the application of Transjordan for membership in the United Nations was under discussion, the representative of the Soviet Union stated that he would not support the application on the ground that Transjordan did not have normal diplomatic relations with the Soviet Union. This led the representative of Australia to state that since the representative of the Soviet Union was a permanent member and had announced that he would not support the application, the application of Transjordan, therefore, would fail. Reacting to the Australian representative's statement, the representative of China questioned the proper interpretation of Article 27 of the Charter in the following words:

At the 325th meeting of the Security Council, on June 22, 1948, a draft resolution to the effect that the Security Council "directs the Secretary-General to transmit to the General Assembly and to the Member States of the United Nations, the First, Second and Third Reports of the Atomic Energy Commission, together with the records of deliberations of the Security Council on this subject, as a matter of special concern" was submitted by the representative of Canada as "a simple procedural resolution."¹⁴ The representative of the Soviet Union, Mr. Gromyko, did not agree that the draft resolution was a procedural one, but stated that he did not intend "to compel the Security Council to follow the complicated procedure, invoking the San Francisco Declaration," in order to decide the preliminary question as to whether the procedural vote would apply in this matter. When the draft resolution was put to a vote, Mr. Gromyko abstained from voting and declared that he had kept his word and did not vote against the resolution. The resolution was then adopted by the Security Council.¹⁵

3. CHALLENGES TO THE PRACTICE OF THE SECURITY COUNCIL

The first challenge to this practice of the Security Council was made in connection with the India-Pakistan question. The challenge came from the representative of Argentina, Mr. Arce, who asked to place on record that he considered the resolution adopted by the Security Council to establish the United Nations Commission for India and Pakistan to be legally invalid because one permanent member had abstained from voting.¹⁶ The representative of the United Kingdom, Mr. Noel-Baker, made a reservation with regard to the substance of Mr. Arce's statement and observed that every written constitution was always developed by the practice of the constitutional organs which had to work it and that a process of develop-

"... Is it possible to interpret the Charter so that in this particular case, in the admission of new members, we are allowed to abstain and that abstention counts as a neutral vote?..."

See Security Council, Official Records, 1st Year, 2nd ser., No. 5, p. 95.

On another occasion, before a vote was taken on a Soviet draft resolution proposing the establishment of a special commission to insure proper supervision that the aid received by Greece would be used only in the interest of the Greek people, the United States delegate made the following statement:

"... I wish to have the record show that the United States will not exercise a veto, that the United States has considerable regard for a practice which has grown in the Security Council by usages until it constitutes a very good practical construction of Article 27 of the Charter. And in this case, although the United States is opposed to the resolution, it will abstain, but will not veto."

The Soviet draft resolution, having received only two votes in its favor, failed of adoption. See Security Council, Official Records, 2nd Year, No. 37, p. 803.

¹⁴ Security Council, Official Records, 3rd Year, No. 88, p. 13.

¹⁵ *Ibid.*, pp. 14-22.

¹⁶ U.N. Doc. S/P.V. 232, pp. 2-10 (Jan. 23, 1948).

ment had, doubtless, begun in the Security Council. He expressed the hope that the Security Council would adhere to its practice of not considering as a negative vote the abstention by a permanent member in a vote on a matter of substance.¹⁷ The representative of France, Mr. de la Tournelle, declared that the French Delegation, both in the General Assembly and in the Security Council, had consistently taken the position that an abstention did not constitute a negative vote.¹⁸

The same challenge again came up in the case of the admission of Israel to membership in the United Nations. At the 414th meeting of the Security Council on March 5, 1949, before the United States draft resolution was put to a vote, the representative of the United Kingdom explained that his delegation would abstain from voting and would not vote against Israel's admission because the United Kingdom did not intend to use its privileged veto to block the admission of any state which obtained the requisite majority.¹⁹ After the resolution was adopted by 9 votes to 1, with the United Kingdom abstaining, the President of the Council reiterated that "in accordance with the principle established by the Security Council on resolutions subject to the unanimity rule, abstention by a permanent member of the Council does not render the Council's decision invalid." The representative of Argentina again disputed this view and stated that contrary to the view held by some, if not by practically all of the permanent members of the Council, this resolution had not been supported by the five permanent members of the Security Council as required by Article 27, paragraph 3, of the Charter. While the President, he said, had referred to an established principle, he did not believe that the Security Council could establish principles to modify the Charter whenever it thought fit. He asked that this statement of his be placed on record. The representative of Egypt registered the same doubt.²⁰

Later, at the 443rd meeting of the Security Council, after a draft resolution on the admission of Portugal to membership was once more vetoed by the Soviet Union, Mr. Arce, comparing this case with that of the admission of Israel, stated that although in the one case there was an opposing vote and in the other an abstention, there were in both cases four con-

¹⁷ *Ibid.*, p. 11.

¹⁸ *Ibid.*, p. 12.

¹⁹ Security Council, Official Records, 4th Year, No. 17, pp. 2-3.

²⁰ *Ibid.*, p. 14. When the recommendation by the Security Council on the admission of Israel to membership was considered by the Ad Hoc Political Committee at the second part of the third session of the General Assembly, the representative of Pakistan raised a preliminary question that the Security Council failed to comply with the explicit terms of Article 27 of the Charter in recommending Israel for membership. The representative of Iraq expressed the same point of view. See General Assembly, Official Records, 3rd Sess., Pt. II, Ad Hoc Political Committee, 42nd meeting, May 3, 1949, pp. 181-182, 184-185.

curing votes of the permanent members and that the Charter did not distinguish between abstentions and negative votes.²¹

4. DISCUSSIONS IN THE SECURITY COUNCIL AND ITS RECENT PRACTICE ON THE QUESTION OF THE ABSENCE OF A PERMANENT MEMBER

The first case in which a resolution was adopted despite the absence of a permanent member was the Iranian Case. After the withdrawal of the Soviet Union representative from the Security Council meeting on March 26, 1946, a draft resolution submitted by the United States was adopted on April 4, 1946, to the effect that the Security Council defer further proceedings on the Iranian Case until May 6, at which time the Soviet Government and the Iranian Government were required to report to the Security Council whether the withdrawal of the Soviet troops from the whole of Iran had been completed and at which time the Security Council would consider what, if any, further proceedings on the Iranian Case were required.²² Answering the contention of Mr. Gromyko, the Soviet representative, that a decision could not be taken by the Security Council without first hearing both parties, the representative of The Netherlands observed that if a party did not avail itself of the opportunity to be heard, this did not preclude the Security Council from taking a decision on matters where the vote of the member in question was not absolutely required. He further stated that the veto right of the Great Powers was a limited right and, therefore, could not be extended beyond the terms of the Charter by the Great Power which was a party to a question before the Security Council, simply by absenting itself from the Council's deliberations.²³

At a subsequent meeting of the Security Council on May 8, 1946, the representative of Australia, Mr. Hasluck, called attention to the absence of a member from the Council's table. While maintaining that the Australian Delegation did not admit that the absence of a member affected the voting procedure in the Security Council, he pointed out that even if the Council adopted so simple a resolution as the one before it (i.e., the resolution of April 4 mentioned above), the constitutionality of that resolution might, rightly or wrongly, be called into question because of the absence of a member. Should the Security Council be prepared to accept

²¹ Security Council, Official Records, 4th Year, No. 41, p. 29. Mr. Arce made statements to the same effect on two other occasions, *ibid.*, No. 18, p. 9, and No. 39, p. 15.

²² Security Council, Official Records, 1st Year, 1st ser., No. 2, pp. 88-89. It is to be noted that at the 27th meeting on March 27, 1946, after the withdrawal of the Soviet Delegation, an Egyptian proposal to invite the Iranian representative to participate in the discussion was adopted. But before putting this proposal to a vote, the President of the Council (the representative of China) stated that since the proposal was "a purely procedural question," a decision could be taken even in the absence of the U.S.S.R. representative. *Ibid.*, p. 60.

²³ *Ibid.*, p. 128.

either of the following propositions: (1) a Member holding office in the Council and representing all the Members of the United Nations could select an occasion on which he did not choose to act as a representative and on behalf of the other Members and (2) a member by absenting himself could also prevent the Council from taking action? Such acceptance, he urged, would "constitute a very extensive *de facto* amendment of the provisions of the Charter" and "imply a very serious extension of the power of veto."²⁴ The representative of the United Kingdom, Sir Alexander Cadogan, considered that Mr. Hasluck's opinion exaggerated a little the difficulty that the Security Council had to face and made the following statement:

The absence of one of our members from this table does not halt the Council's work. We sit here and function. . . .

. . . as regards the effect of absence upon the action of the Council or upon the voting, I cannot see that there is really any difference between absence from this table or presence at a table and abstention from a vote. It seems to me that the general effect is the same. . . .²⁵

Sir Alexander's view that the absence of a member could not halt the work of the Security Council was echoed three and a half years later by the representative of the United States, Mr. Gross, at the 461st meeting of the Council on January 13, 1950. Mr. Gross' statement was made after the withdrawal of the Soviet Delegation from that meeting of the Security Council when a draft resolution proposed by the Soviet Union to unseat the Chinese representative was defeated. Urging that the Security Council should proceed with the next item on the agenda, *i.e.*, the General Assembly's resolution concerning the regulation and reduction of conventional armaments and armed forces, Mr. Gross stated as follows:

The absence of the Soviet Union will not prevent us from conducting the business to which we are pledged. It is the view of my Government that the absence of a permanent member from a meeting of the Security Council in no way diminishes its power or its authority to act. The Charter provides in Article 28 that:

"The Security Council shall be so organized as to be able to function continuously."

²⁴ *Ibid.*, pp. 248-250.

²⁵ *Ibid.*, p. 251. At the 392nd meeting of the Security Council, after a vote was taken on the preamble of a draft resolution concerning the Indonesian question and the Ukrainian representative being absent, the representative of the United States, Mr. Jessup, asked whether an absent member was counted as having abstained. The President of the Council replied that: "It seems to me that he must be counted as having abstained. I do not see how we could act otherwise." There was no objection to this statement of the President. Although in this case the absence was that of a non-permanent member, the fact that absence was counted as abstention deserves attention. See Security Council, Official Records, 3rd Year, No. 134, p. 30.

We cannot permit this arbitrary action of our Soviet Union colleague to prevent us from fulfilling our obligation to the Charter.²⁶

The resolution adopted by the Security Council at its 462nd meeting on January 17, 1950, in the absence of the Soviet Union, was to transmit the General Assembly's resolution concerning the regulation and general reduction of conventional armaments and armed forces to the Commission for Conventional Armaments for further study.²⁷ In view of the Soviet statement denying the procedural nature of the Council's resolution concerning the transmittal of the Reports of the Atomic Energy Commission,²⁸ it is uncertain whether the procedural nature of the present resolution would have passed uncontested had the Soviet representative been present.

The first clearly substantive resolution was adopted by the Security Council in the absence of a permanent member at its 470th meeting on March 14, 1950.²⁹ On this date, the Security Council, by 8 votes to none, with 2 abstentions, approved the draft resolution submitted jointly by Cuba, Norway, the United Kingdom and the United States calling upon the governments of India and Pakistan to make immediate arrangements to prepare and execute a program of demilitarization of the State of Jammu and Kashmir. The resolution also provided for the appointment of a United Nations representative to perform certain specific functions in connection with this question. At its 471st meeting on April 12, 1950, the Security Council approved the appointment of Sir Owen Dixon as the United Nations representative for India and Pakistan.³⁰ No objection was raised to the passage of these two resolutions on the ground that a permanent member was absent.

In the months of June and July, 1950, four substantive resolutions were adopted by the Security Council in connection with the complaint of aggression upon the Republic of Korea. In its first resolution of June 25, 1950, the Council, having determined that "the armed attack upon the Republic of Korea by forces from North Korea" constituted a breach of the peace, called for the immediate cessation of hostilities and called upon all Members to render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities.³¹ The second resolution of the Council, adopted on June 27, 1950, recommended "that the Members of the United Nations furnish such

²⁶ U.N. Doc. S/P.V. 461, p. 18.

²⁷ U.N. Docs. S/P.V. 462, p. 10, and S/1445. In reply to a statement of the Yugoslav representative, the representative of the United States stated that the absence of a permanent member clearly was the absence volunteered by the representative himself and the Council had clearly indicated it would not take it as a deterrent to its proceeding in an orderly manner with its business. See U.N. Doc. S/P.V. 462, p. 12.

²⁸ *Loc. cit.*, notes 14 and 15, *supra*.

²⁹ U.N. Docs. S/P.V. 470, p. 5, and S/1461.

³⁰ U.N. Doc. S/P.V. 471, p. 7.

³¹ U.N. Doc. S/1501.

assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.”³² The third resolution, adopted on July 7, 1950, recommended that all Members providing military forces and other assistance pursuant to the first two resolutions of the Security Council “make such forces and other assistance available to a unified command under the United States” and requested the United States to designate the commander of such forces.³³ The fourth resolution, adopted on July 31, 1950, requested “the Unified Command to exercise responsibility for determining the requirements for the relief and support of the civilian population of Korea, and for establishing in the field the procedures for providing such relief and support”; and requested

the Secretary-General, the Economic and Social Council in accordance with Article 65 of the Charter, other appropriate United Nations principal and subsidiary organs, the specialized agencies in accordance with the terms of their respective agreements with the United Nations, and appropriate non-governmental organizations to provide such assistance as the Unified Command may request for the relief and support of the civilian population of Korea, and as appropriate in connexion with the responsibilities being carried out by the Unified Command on behalf of the Security Council.³⁴

The validity of these resolutions was contested by several states. In a cablegram dated June 29, 1950, to the Secretary General of the United Nations concerning the Security Council resolution of June 27, 1950, the Government of the U.S.S.R., having asserted that one vote was cast by the “Kuomintang representative” of China, stated that:

. . . the above resolution was passed in the absence of two permanent members of the Security Council, the Union of Soviet Socialist Republics and China, whereas under the United Nations Charter a decision of the Security Council on an important matter can only be made with the concurring votes of all five permanent members of the Council, viz., the United States, the United Kingdom, France, the Union of Soviet Socialist Republics, and China. In view of the foregoing it is quite clear that the said resolution of the Security Council on the Korean question has no legal force.³⁵

The same view was expressed in declarations made by such Member States as Czechoslovakia,³⁶ Poland,³⁷ the Ukrainian Soviet Socialist Re-

³² U.N. Doc. S/1511.

³³ U.N. Doc. S/1588.

³⁴ U.N. Doc. S/1657.

³⁵ U.N. Doc. S/1517. A similar view was expressed by the Government of the U.S.S.R. with respect to the resolution of July 7, 1950. Cf. U.N. Doc. S/1596/Rev.1. See also statement made on July 4, 1950, by Mr. Gromyko, U.N. Doc. S/1603, p. 4.

³⁶ U.N. Doc. S/1523.

³⁷ The Polish Government contended that the resolution of June 27, 1950, “cannot be considered as a resolution of the Security Council, but merely as a non-binding opinion of six members of the United Nations.” See U.N. Doc. S/1545, pp. 2-3.

public³⁸ and the Byelorussian Soviet Socialist Republic.³⁹ The Secretary General also received similar statements from the Korean People's Democratic Republic⁴⁰ and the People's Republic of China.⁴¹

At the 475th meeting of the Council on June 30, 1950, the representative of France, commenting on the above-mentioned statement of the Soviet Government, invoked the old adage of Roman law, "*Nemo auditur propriam turpitudinem allegans*," and observed that "the delegation of the Soviet Union, by abandoning the Council, has abandoned the Charter. When it returns to the one and to the other, it will find again its right of speech, of criticism, of vote and of veto. So long as it has not done so, the U.S.S.R. Government has no legal or moral basis for contesting the action of the United Nations."⁴²

In a statement⁴³ issued on the same day, the Department of State of the United States cited several precedents with respect to abstention and concluded that "every member of the United Nations, including the U.S.S.R., accepted as legal and binding decisions of the Security Council made without the concurrence, as expressed through an affirmative vote of all permanent members of the Council." It also stated that:

... the voluntary absence of a permanent member of the Security Council is clearly analogous to abstention.

Furthermore, Article 28 of the Charter provides that the Security Council shall be so organized as to be able to function continuously. This injunction is defeated if the absence of a representative of a permanent member is construed to have the effect of preventing all substantive action by the Council.

5. DISCUSSIONS AND SUGGESTIONS MADE IN OTHER UNITED NATIONS ORGANS

The problem of "Voting Procedure in the Security Council" was discussed at the first three regular sessions and in the Interim Committee of the General Assembly. Although these discussions had not been focused on the effect of voluntary abstention and absence of a permanent member in relation to the unanimity rule contained in Article 27, paragraph 3, of the Charter, certain statements made in connection with this article deserve attention.

At the second part of the first session of the General Assembly, when the problem of "Voting Procedure in the Security Council" was debated in the First Committee, the representatives of the United Kingdom, El Salva-

³⁸ U.N. Doc. S/1598.

³⁹ U.N. Doc. S/1600.

⁴⁰ U.N. Docs. S/1527 and S/1527/Corr.1; S/1554, p. 3.

⁴¹ U.N. Doc. S/1583.

⁴² Security Council, Official Records, 5th Year, No. 17, p. 8.

⁴³ United States Policy in the Korean Crisis (U. S. Department of State Pub. 3922, Far Eastern Series 34), pp. 61-63.

dor, Egypt, Canada and the United States felt that the abstention of a permanent member should not generally be considered as a veto.⁴⁴ The representative of the United Kingdom, supported by the representative of Egypt, observed that the fact that a permanent member was not present at a meeting of the Security Council should not be considered as involving his veto against decisions taken in his absence.⁴⁵ Two significant suggestions were made in the course of the debate:

The French representative suggested an "optional veto" and explained that there were two alternative ways of putting this suggestion into effect: (1) the vote of a permanent member which was in a minority or which abstained would only count as a veto on its express request to that effect; and (2) its minority vote or its abstention would count as a veto unless it expressed a wish to the contrary.⁴⁶

The Delegation of the United Kingdom suggested, *inter alia*:

It would be of great advantage if it were possible to provide, by some means, that a permanent member could abstain from voting without automatically vetoing the proposal. Similarly that mere absence of a permanent member should not have the effect of a veto.⁴⁷

The resolution adopted by the General Assembly on December 13, 1946,⁴⁸ recommended to the Security Council:

the early adoption of practices and procedures, consistent with the Charter, to assist in reducing the difficulties in the application of Article 27 and to ensure the prompt and effective exercise by the Security Council of its functions.

This resolution was transmitted to the Security Council and the latter decided, on August 27, 1947, to refer it to its Committee of Experts.⁴⁹ A concrete proposal was submitted by the Delegation of the United States to this Committee in the form of draft rules of procedure of the Security Council relating to voting. The proposed Rule C read:

Any member or members of the Security Council may abstain from voting on any decisions of the Security Council.

In the event of abstention by a permanent member from voting on a decision pursuant to Article 27(3) of the Charter such decision shall be made by an affirmative vote of seven members including the affirmative votes of the permanent members not abstaining.⁵⁰

⁴⁴ See General Assembly, Official Records, 1st Sess., Pt. II, First Committee, pp. 92, 94, 112, 115, 117. The Soviet representative, however, stated that "abstention of the permanent members was equal to invoking the unanimity rule." *Ibid.*, p. 99. *Cf.* U.N. Doc. A/C.1/63, p. 4.

⁴⁵ *Ibid.*, pp. 115, 117.

⁴⁶ *Ibid.*, pp. 109-110.

⁴⁷ U.N. Doc. A/C.1/95.

⁴⁸ General Assembly resolution 40(I).

⁴⁹ Security Council, Official Records, 2nd Year, No. 85, p. 2281.

⁵⁰ U.N. Doc. A/C.1/160, Sept. 2, 1947, p. 3.

At the second session of the General Assembly, the problem of "Voting Procedure in the Security Council" was referred to the First Committee for discussion and report. The representative of France in this Committee supported a United States proposal providing for consultation between the permanent members of the Security Council and stated that that was one of the constructive ways in which the operation of the veto could be improved. He referred to the meetings held on the subject between the permanent members in 1946, and submitted that they had by no means been fruitless, as they had resulted in the interpretation that an abstention by a permanent member of the Security Council did not constitute a "veto,"⁵¹ thus revealing the fact that the practice of the Security Council in not regarding abstention as a negative vote had been the result of consultation among permanent members. At the 122nd plenary meeting of the General Assembly, the representative of the Soviet Union explained his position with regard to abstention as follows:

In a number of cases, when we disagreed with the majority and had a legal, formal right to apply the so-called "veto" in the Security Council, we did not apply it. The French representative, Mr. Parodi, pointed out here that the U.S.S.R. delegation took the initiative of interpreting an abstention not as a "veto", although there is every legal justification for doing so, but as an abstention which is not tantamount to a "veto", the idea being to facilitate the settlement of a question on which unanimity had not been reached. But the U.S.S.R. delegation and the U.S.S.R. Government did so quite explicitly and deliberately in the case of questions which had no bearing on the principles which are the essence of our Organization's work.⁵²

The General Assembly then decided to refer the entire problem of voting procedure in the Security Council to the Interim Committee for consideration and to request the permanent members of the Security Council to consult with one another in order to secure the prompt and effective exercise by the Security Council of its functions.⁵³ A memorandum on "Review of discussion regarding the voting procedure of the Security Council" was prepared and submitted to the Interim Committee by the Secretariat of the United Nations, in which it was stated that "since abstention by a permanent member is now an established practice of the Council, suggestions hitherto made with regard to abstention are not listed here."⁵⁴ The Interim Committee did not discuss the problem of voluntary abstention or that of absence, nor was any recommendation with regard to this problem made in its Report to the Third Session of the General Assembly.⁵⁵

⁵¹ General Assembly, Official Records, 2nd Sess., First Committee, p. 522.

⁵² *Ibid.*, 2nd Sess., Pt. 1, Plenary Meetings, p. 123.

⁵³ General Assembly resolution 117(II), Nov. 21, 1947.

⁵⁴ U.N. Doc. A/AC.18/SC.3/2, March 23, 1948, p. 13.

⁵⁵ At the 18th meeting of the Interim Committee, the representative of France referred to the "custom of abstention" which "had been put into practice." At the

At the Third Session of the General Assembly, the representative of Canada in the Ad Hoc Political Committee⁵⁶ and the representative of the United States in a plenary meeting⁵⁷ both referred to the practice of the Security Council in not treating abstention as a veto and considered this practice as generally accepted and recognized. A joint draft resolution was submitted by China, France, the United Kingdom and the United States to the Ad Hoc Political Committee which recommended, *inter alia*, that the permanent members of the Security Council seek agreement among themselves upon what possible decisions by the Security Council they might forbear to exercise their veto, when seven affirmative votes had already been cast in the Council. When the representative of Australia asked for an explanation of this recommendation, the representative of the United Kingdom replied that it meant that "before a question was discussed in the Security Council the permanent members should confer as to whether or not that question should be subject to the veto; if they decided it should not, and the proposal received seven affirmative votes, they would *abstain* and not use the veto."⁵⁸

From the above survey of the discussions which took place in the Security Council, and also in the General Assembly, up to the end of July, 1950, the following conclusions may be drawn:

(1) As far as voluntary abstention by a permanent member is concerned, the practice of the Security Council in not treating it as a negative vote seems to have been established and generally recognized. The significance of this practice is revealed by the remarkably large percentage of substantive decisions taken with one or more permanent members abstaining. Had the abstentions been considered as negative votes, the Security Council would have adopted very few substantive decisions in its more than four years' history. This practice may be reconciled with the provision of Article 27, paragraph 3, on the ground that "a permanent member who has the opportunity to exercise its veto power but chooses to refrain from

19th meeting, the representative of Argentina again considered it illegal to maintain an abstention was not equivalent to a veto. See U.N. Docs. A/AC.18/SR.18, p. 5, and A/AC.18/SR.19, p. 8.

⁵⁶ General Assembly, Official Records, 3rd Sess., Pt. I, Ad Hoc Political Committee, p. 195.

⁵⁷ *Ibid.*, Pt. II, Plenary Meetings, p. 52.

⁵⁸ *Ibid.*, Pt. I, Ad Hoc Political Committee, p. 287. However, both at the second and at the third sessions of the General Assembly, the representative of Argentina, Mr. Arce, repeatedly argued that an abstention by a permanent member was a "hidden veto" and that even if it were agreed that such an abstention did not constitute a veto, it would nevertheless have to be admitted that this interpretation by members of the Security Council amounted to an amendment of the Charter. *Ibid.*, 2nd Sess., Plenary Meetings, p. 1255; 3d Sess., Pt. I, Ad Hoc Political Committee, pp. 255-256; 3d Sess., Pt. II, Plenary Meetings, pp. 74-75.

exercising it should not be obliged to have its abstention counted as a negative vote.⁵⁹

(2) Despite challenges subsequently made to the legality of several substantive resolutions of an important character recently adopted by the Security Council in the absence of a permanent member, the support of the decisions contained in these resolutions by a large number of Member States, and the action taken by many of them in pursuance of the decisions, warrant the conclusion that the practice of the Security Council in this respect has been generally accepted.⁶⁰

⁵⁹ See Yuen-li Liang, *loc. cit.* (note 1, *supra*), p. 359.

⁶⁰ In connection with the resolutions of the Security Council of June 25 and 27, 1950, on the Korean question, by the end of July, 1950, the following Member States had expressed their support or had taken action in pursuance thereof: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Israel, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Saudi Arabia, Sweden, Syria, Thailand, Turkey, Union of South Africa, United Kingdom, United States, Uruguay, Venezuela, Yemen. See excerpts from the replies of these Member States in United Nations Bulletin, Vol. IX, Nos. 2-3, July 15 and August 1, 1950.

Concerning the Security Council resolutions of June 25 and 27, and July 7, 1950, the Secretary General, on July 14, 1950, addressed communications to certain Member States requesting them to consider the possibility of giving to the Unified Command additional effective assistance, including combat forces, particularly ground forces. As of July 26, 1950, the following Member States replied: Argentina, Australia, Belgium, Brazil, Canada, Denmark, France, Greece, Lebanon, Norway, Peru, Philippines, Sweden, Turkey, United Kingdom, United States. See U.N. Docs. S/1608, S/1618, S/1620, S/1616, S/1617, S/1610, S/1611, S/1612, S/1609, S/1614, S/1613, S/1615, S/1625; reproduced also in New York Times, July 22 and 27, 1950.

EDITORIAL COMMENT

LEGAL ASPECTS OF THE SITUATION IN KOREA¹

The legal aspects of the situation in Korea may not constitute the most important aspects of that situation, or be decisive of the action which the United States or other countries, or the United Nations, should take in that unhappy land, in their own interests or in the interests of international welfare. Nevertheless they should not be passed over in silence, as has so far been the case, or nearly so. Students of international law will insist upon some attention being given to these issues and it would obviously be well to be prepared to meet allegedly juridical criticism of United States and United Nations action in Korea, both now and later.

Korea was under Japanese sovereignty in August, 1945, prior to the surrender of Japan. At the time of her surrender on September 2, 1945, Japan renounced that sovereignty by accepting the Potsdam Declaration of July 26, 1945, in which an earlier Declaration (Cairo, December 1, 1943)² of the United States, the United Kingdom and China, was accepted by Russia and confirmed; according to these Declarations, Korea was to become a free and independent state. It is true that this surrender was intended, in the normal course of events, to be finalized in a treaty of peace between Japan and the states at war with her; but nothing was said at the time to make the Japanese surrender of sovereignty over Korea depend upon such validation and it will hardly be contended now that, even in the formal legal sense, Japan retains sovereignty over Korea.

During the months of August-September, 1945, Korea came to be occupied by Soviet Russian and United States troops north and south of the 38th parallel of north latitude, respectively, although the two occupants agreed in Moscow in December that a Korean government should eventually be set up for the whole country. Implementation of this agreement (which called for a joint commission and other steps) was, however, subsequently blocked by Soviet opposition. Up to that time, and, indeed, down to the end of 1947, there had been no establishment of a Korean state but also no legal partition of the country, in terms of territorial sovereignty.

In November of 1947 the United States sought United Nations backing for the execution of the Moscow Agreement with respect to government of Korea; that Organization voted for the establishment of a national

¹ Completed August 10, 1950. Most of the pertinent materials on this whole case may be found in United States Department of State, Publications No. 3305: Korea 1945 to 1948 (October, 1948), and No. 3922: United States Policy in the Korean Crisis, (July, 1950).

² This JOURNAL, Supp., Vol. 38 (1944), p. 8.

government for all Korea and created a temporary commission to assist the Koreans in the implementation of that action. The Russians denied that the United Nations had any jurisdiction over the Korean problem, which related to the war and the conclusion of peace, in view of Article 107 of the United Nations Charter.³ They refused to permit the United Nations Commission to enter Northern Korea and denied the validity of any action taken in the southern part of the country. Nevertheless, elections were held there on May 10, 1948, under supervision of the Commission, and a government was established on August 15 in accordance therewith; in December the United Nations accepted the Seoul Government as valid for Southern Korea; although Russian vetoes prevented its election to membership in the Organization, it was sooner or later recognized by some forty states, including, of course, the United States, as the "Republic of Korea."

What is to be said of the Russian denial of United Nations jurisdiction over the Korean question *in toto*? This argument had been raised in 1947, in fact, when the Korean question was first placed before the United Nations. Actually Article 107 does not preclude the United Nations from acting upon a matter related to, or forming part of, the peace settlement, but simply protects any action taken in such matters by a belligerent state. In this light the United Nations could act freely in reference to Korea so long as it did not attempt to contravene any action of Soviet Russia, and, as the United Nations confined its efforts merely to encouraging implementation of something to which the Russians had agreed, and, later, to repelling the aggression of the Northern Koreans, no case has arisen under Article 107.

What is more, the Russian action of 1946-1947—obstructing reasonable settlement of the problem which had arisen between themselves and the United States and the Korean people, in accordance with their own agreement—alters the situation profoundly. The United States made a fair attempt to apply Article 107 and the Russians arbitrarily defeated that effort. Furthermore, by this time the situation had become sufficiently acute to justify thoroughly the invocation of the powers of the United Nations to deal with situations endangering good international relations and ultimately world peace; and if Article 107 would constitute an exception to that authority in normal circumstances, this could hardly be pleaded by a government which had deliberately rendered that article inoperative. By November, 1947, no valid juridical bar to United Nations intervention existed or certainly no moral bar. If anything, the experience had shown the unsoundness of the theory back of Article 107 in the first place, and the need for correcting the defective legal situation created by it.

Taking matters in their own hands in Northern Korea, the Russians en-

³ Text: "Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action."

couraged the establishment of a "Democratic People's Republic of Korea," claiming jurisdiction over the entire country, on September 9, 1948. The new entity did not become a part of the Soviet Union, although a satellite thereof. The government has not, of course, been admitted to the United Nations or been recognized by any states Members thereof outside of the Soviet bloc. The Russians later announced that they had withdrawn their occupying forces in December, 1948; the United States withdrew its forces from Southern Korea in June, 1949, as was verified and reported by the United Nations Commission in July.

North Korean forces invaded Southern Korea in full strength on June 25, 1950. The United Nations at once noted this breach of the peace, called upon the North Koreans to withdraw from the Republic of Korea, and called on all Members to assist the United Nations in carrying out the resolution and to refrain from giving aid to the North Koreans. Two days later the Security Council recommended to all members to furnish aid to the Republic of Korea in repelling the attack and recovering its peace and security. On July 7 it recommended that the aid furnished by Members—the Members had responded favorably and almost unanimously to the recommendations of June 27—be placed in a unified force under United States command and authorized use of the United Nations flag in the operations.

Soviet Russia has denied again the jurisdiction of the United Nations in Korea or over the North Korean government, and has denied the validity of the resolutions of the Security Council in view of the continued presence of the Nationalist China delegate and her own non-participation in the votes. Finally she has argued that this is an ordinary civil war in Korea and that neither the United Nations nor any of its Members, notably the United States, have any right to intervene therein.

Again it appears necessary to admit that the United Nations has no jurisdiction over North Korea and that that government has no obligations under the Charter, or under any other legal instrument or principle, to refrain from aggression against the Republic of Korea. No mention was made in the Security Council resolutions of Article 2, paragraph 6, of the Charter, which purports to authorize action against non-member states,⁴ but such mention could hardly have added any juridical basis for United Nations authority over Northern Korea. On the other hand, there is certainly no legal bar to action by the United Nations or its Member States designed to protect even a non-member state against another non-member if it seems wise and desirable to them to do so, apart from some special consideration. There is no need to cite any article of the Charter or any other document

⁴ Text: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

in this connection and no purpose would be served by doing so; this is a case of simple common international law.

The denial of validity to the Security Council resolutions could be argued at great length, but prior to June 25, 1950, abstention had not been treated as a veto and we must probably for the moment be content with the finding on this point of the Members of the United Nations themselves. It will also be noted that the Security Council contented itself with recommendations and authorizations and this reduces greatly the strength of the argument that unanimity of permanent member votes was required. It is true that the resolution of June 25 employed the term "determines" (a breach of the peace) but no effort was made to follow this by any formally authoritative action.

Finally the Russian argument against intervention in civil war breaks down over the fact that the other Members of the United Nations had long been treating the Republic of Korea as an established state and had every right to do so; they could not impose this view on Soviet Russia, just as they could not elect the Republic of Korea to membership over Russian objection; but neither can Russia demand that other states accept the view that the Republic does not exist and that consequently the attack of North Korea on the south is merely a civil war. For that matter it has never really been established that outside states are barred from going to the aid of a recognized state or government confronted with civil rebellion and appealing for aid, although all students of international relations would readily agree that such action is very debatable and must be taken only where the political and ethical claims of the government appealing for aid are very sound. The result of all circumstances and considerations in this respect is certainly not clearly on the Soviet Russian side, and still less so if the actual facts of the situation are taken into account and not merely the external legal formalities, not to say fictions.

In sum, while the legal case of the United Nations and the United States against Soviet Russia in the matter of Korea is not completely clear and simple, and requires appeal not merely to formal legal instruments and to juridical principles but also to considerations of ethics and political wisdom, it is, on the whole, sound. It would be a mistake to be too formalistic and too puritanical in stating the case against Soviet or North Korean aggression; one weakens one's position by exaggerating one's claims. It would be a mistake not to recognize the defects of common international law, and especially those of the Charter, concerning the conclusion of peace, recognition, aggression, the unanimity rule, and intervention, not to go further. At times—as perhaps in war crimes trials—international welfare demands extra- or ultra-legal action. But it is always useful to face all the facts, legal as well as physical, including the need for such action in some cases.

PITMAN B. POTTER

CRITICAL REMARKS ON LAUTERPACHT'S "RECOGNITION IN INTERNATIONAL LAW"

The problem of recognition in international law has been the subject of a far-flung practice of states, of many decisions of national and international courts, of many treaties and of an enormous literature. It has often been treated by learned societies and was again on the agenda of the 1950 Annual Meeting of the American Society of International Law. It has played a great rôle in the League of Nations, in the inter-American system and in the United Nations. Yet, this problem "has neither in theory nor in practice been solved satisfactorily. Hardly any other question is more controversial."¹ The reason is that recognition "is a subject of enormous complexity, principally because it is an amalgam of political and legal elements in a degree which is unusual even for international law."² This situation explains why recognition was the only proposed topic of the Harvard Law School Research in International Law upon which no report was drafted. In 1928 this writer published a comprehensive monograph on recognition,³ in which he tried to state the positive international law on the basis of a full study, summary and critique of the practice of states, court decisions and the literature. His neutral and impartial study led to the adoption of the so-called "declaratory doctrine." He proved that under positive international law there is no right to recognition by new states or *de facto* governments, nor is there a legal duty to recognize them.

Certainly much has happened in this field since 1928, and a new comprehensive monograph was in order. The book by Professor Lauterpacht,⁴ a great and truly leading international lawyer, is, as everything which Lauterpacht writes, entitled to the greatest interest. The book has many excellent qualities, publishes hitherto unknown documents, gives exceedingly interesting discussions and highly valuable analyses of difficult recent recognition cases, especially with regard to the Italian conquest of Ethiopia and the Spanish Civil War. But Lauterpacht's principal thesis which probably constitutes the reason why the book was written, namely, his assertion of a right to recognition and a duty to recognize, is certainly entirely untenable as not being in accord with positive international law.

To understand fully Lauterpacht's position, it is necessary to point out an article, published in the period between this writer's monograph of 1928 and Lauterpacht's monograph of 1947, from the pen of the scholar from whom we both theoretically stem: Hans Kelsen.⁵ In his usual power-

¹ H. Kelsen, "Recognition in International Law—Theoretical Observations," this JOURNAL, Vol. 35 (1941), p. 605.

² Alwin V. Freeman, in this JOURNAL, Vol. 44 (1950), at p. 378.

³ Josef L. Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht (Handbuch des Völkerrechts, II/3, Stuttgart, 1928, pp. 218).*

⁴ H. Lauterpacht, *Recognition in International Law* (Cambridge, England, 1947, pp. xx, 442).

⁵ Kelsen, *loc. cit.*, pp. 605-617.

ful logical reasoning and wonderful lucidity Kelsen distinguished between the political and the legal act of recognition. The first, consisting of the willingness to enter into political relations, is an act wholly within the discretion of the recognizing state. But the legal act of recognition is the ascertainment (*la constatation*) that certain requirements, prescribed by international law, have been fulfilled by a legal community or a body of persons (government). Legal recognition is for Kelsen strictly constitutive in character, a theory which was at once attacked⁶ as not being in accord with the practice of states. The position of Kelsen is wholly one which he felt compelled to adopt from purely logical reasons: law cannot deal with "naked facts," but only with facts as ascertained by the legally competent authority in a legally prescribed procedure. This idea entered Kelsen's "Pure Theory of Law" relatively late and that explains that the same Kelsen earlier⁷ held that the norm of general international law laying down the conditions for the coming into existence of a state in the sense of international law establishes recognition and that, therefore, recognition by existing states has only a declaratory, and no juridical, importance.

It is from this idea of recognition as a legal act of ascertaining the fulfillment of requirements laid down by international law that Lauterpacht's book is written, coupled with the idea of a right to, and a duty of, recognition. This principal thesis the author tries to prove as positive international law from the practice of states. In this endeavor, it must be said in the interest of scientific truth, he has failed completely. Criticisms of his untenable thesis are not lacking.⁸ As to the right to and duty of recognition, the author is also in contradiction with Kelsen's above-quoted article. Kelsen correctly states that "existing states are only empowered, not obliged to recognize," and that "refusal to recognize is no violation of general international law." Also Philip C. Jessup, writing *de lege ferenda*, correctly states that under positive international law "states are free to accord or to withhold the recognition of new governments."⁹

This writer has always been and is, of course, entirely in agreement with the statement that it is a norm of general international law which lays down the requirements for the coming into existence of a "state in the sense of international law." Because of the existence of this norm, Jessup's¹⁰

⁶ See Philip M. Brown, "The Effects of Recognition," this JOURNAL, Vol. 36 (1942), pp. 106-108; and Edwin Borchard, "Recognition and Non-Recognition," *ibid.*, pp. 108-111.

⁷ See H. Kelsen, *Das Problem der Souveränität* (1921), pp. 224-241, and *Allgemeine Staatslehre* (1925), pp. 126-127.

⁸ See, e.g., the book review by E. J. Cohn in *Law Quarterly Review*, Vol. 64, No. 255 (July, 1948), pp. 404-408, and the critical remarks by Herbert W. Briggs, "Recognition of States, Some Reflections on Doctrine and Practice," this JOURNAL, Vol. 43 (1949), pp. 113-121.

⁹ Philip C. Jessup, *A Modern Law of Nations* (New York, 1948), pp. 43-67, at p. 55.

¹⁰ *Ibid.*, p. 46.

proposal *de lege ferenda*, according to which the United Nations should adopt a treaty or declaration fixing "certain definite criteria for determining whether an entity has the necessary attributes of statehood," is unnecessary. This writer also fully agrees with the statement that effectiveness of governmental power and reasonable permanency are the only tests to determine in law whether a certain body of persons is a general *de facto* government. This writer further is in complete accord with the statement that the origin of a new state or government which may be violative of pre-existing constitutional law is irrelevant from the point of view of international law. It is exactly the positive norm of effectivity of international law which validates the new state or government. Unsuccessful secession or civil war is treason; successful secession or civil war creates new law. But the rule of effectivity governs also in international law. That is why Lauterpacht's discussion of the so-called "non-recognition doctrine" is of doubtful value.

Leaving aside this non-recognition doctrine as well as the problem of the recognition of belligerency, this writer wants to concentrate his criticism on the heart of Lauterpacht's book: the assertion of the constitutive character of the recognition of new states and governments, coupled with the assertion that positive international law gives a legal right to be recognized and imposes a legal duty to grant recognition. As far as this principal thesis goes, Lauterpacht has entirely failed to prove it; the law is exactly to the contrary.

How did it come about that so serious a scholar as Lauterpacht was led into what must be called a falsification of the positive law? First, it seems, that the wish was the father of the thought. Just as, within dramatic literature, a so-called "*pièce à thèse*" is always in danger of falling short of being a work of art, thus in science a book, written with the preconceived wish to "impress upon the student the fact that the practice of states in the matter of recognition is more permeated with law and principle than is currently assumed,"¹¹ is in danger of falling short of scientific truth. Not logical reasons, as with Kelsen, but ethical considerations moved the author; if there were no legal right to, and legal duty of, recognition, "the problem of recognition would constitute a serious defect in the structure of international law." That is why the author teaches that recognition is "an act of law," not a political act; that recognition, "although declaratory of an existing fact, is made in the impartial fulfilment of a legal duty, and is constitutive";¹² that "recognition is declaratory of facts and constitutive of rights";¹³ that "the correct and reasonable rule is that both the unrecognized government and its acts are a nullity."¹⁴ While recognizing

¹¹ Lauterpacht, *op. cit.*, p. vi.

¹² *Ibid.*, p. 6.

¹³ *Ibid.*, p. 75.

¹⁴ *Ibid.*, p. 147.

that states—sometimes, the author believes—are moved by national interests, that recognition is sometimes a matter of bargain or political pressure, in a word, that there are abuses of recognition, the author holds that in general, states, in granting or refusing to grant recognition, act in an impartial and judicial capacity to administer international law. When the conditions required by international law are present the existing states, he teaches, are under a legal duty to grant recognition and the corresponding entities have a legal right to be recognized.

In teaching these doctrines, in contradiction to positive international law, Lauterpacht forgot that the science of international law cannot by its fiat correct the structural defects of the primitive international legal order. He forgot what his predecessor, in words which are equally true today, warned against forty-two years ago,¹⁵ what he himself recently emphasized:¹⁶ the scholar of international law is not in the rôle of a legislator, but of a judge; of a judge, and not in the rôle of counsel for plaintiff or defendant. It is the duty of the scholar to state what the law is, whether he likes it or not. It is fundamental to distinguish between *lex lata* and *lex ferenda*. Lauterpacht's dialectic efforts to make the practice of states tell what it does not contain, however talented and powerful, are of no help; neither is the attitude of joining the now fashionable accusations against positivism. What is to be discarded is the pseudo-positivism of the nineteenth century which often posed as positivism.

Lauterpacht's basic attitude that, if there is no right to, no duty of recognition, the whole problem belongs only to politics, not to law, is hardly justifiable. The existing states have a right, but not a duty, to recognize. Does the right to vote, without duty to vote, not belong to law? And, to anticipate Lauterpacht's argument of "premature recognition," even where there is merely a right, not a duty to vote, the law lays down the conditions for the exercise of this right. Although there is no duty to vote, a person may make himself guilty of illegal voting.

Lauterpacht's argument of premature recognition is no argument for his thesis of a legal duty to grant recognition. First, we deal here only with a special case of recognition. In the case of revolutionary secession positive international law lays down, apart from the normal condition of effectivity, the further condition that the revolutionary struggle with the mother country must have been virtually ended. If this second condition is not fulfilled, premature recognition constitutes an international delinquency toward the mother country; but this norm creates no duty to recognize the new state. The problem of premature recognition, therefore, does not arise in the frequent cases, where a new state comes into existence with

¹⁵ L. Oppenheim, "The Science of International Law: Its Task and Method," this JOURNAL, Vol. 2 (1908), pp. 813-356.

¹⁶ U.N. General Assembly, International Law Commission, Survey of International Law (Lake Success, N. Y., 1948), pp. 64, 66.

the consent of the mother country (Baltic Republics, 1919, India, Pakistan, Burma, Ceylon, Philippines), or where there is no mother country (Congo State, Israel). And if there were a duty to recognize, why does Lauterpacht not also teach the international delinquency of "tardy recognition," as Borchard would have it? Does Lauterpacht hold that the United States, by not granting recognition for so long a time to the effective Soviet Government, has made herself guilty of an international delinquency in positive law?

The practice of states gives no support to the constitutive theory. Within the Pan American orbit the declaratory doctrine has been emphatically adopted.¹⁷ This brings us to a further methodologically untenable procedure. The author restricts himself to the practice of Great Britain and of the United States and identifies this practice with the "practice of states." Having quoted certain paragraphs of British utterances, containing nothing about a duty of recognition, but merely considerations of convenience and expediency, the author speaks about the "preponderant practice of states,"¹⁸ of the "bulk of state practice."¹⁹ He tells us that

effectivity, evidenced by freely expressed popular approval has been acted upon for a long period by Great Britain and the United States, the two countries which have made the greatest contributions to the development of recognition. To that limited extent the right of man to be governed by consent has become, through the doctrine of recognition, part of international law.²⁰

Such language must not only nourish non-English accusations against an Anglo-American superiority complex of righteousness,²¹ but is also scientifically untenable.

Italian courts apply the law indicated as governing by their conflict of laws rule, regardless of whether the state in question has or has not been recognized by Italy.²² The constitutive theory is contradicted by many American court decisions, stemming from the leadership of Cardozo.²³ It is contradicted by Taft's famous decision in the *Tinoco Arbitration*, 1922,²⁴

¹⁷ *Montevideo Convention* of 1933 on Rights and Duties of States, Art. 3.

¹⁸ Lauterpacht, *op. cit.*, p. 6.

¹⁹ *Ibid.*, p. 32.

²⁰ *Ibid.*, p. 171.

²¹ Thus recently Rolando Quadri speaks of the "*paesi anglo-americani che tradizionalmente si considerano investiti di una specie di superpotere internazionale*," *Diritto Internazionale Pubblico* (Palermo, 1949), p. 298.

²² G. Ballardore Pallieri, *Diritto Internazionale Privato* (2nd ed., Milan, 1950), p. 95.

²³ See e.g., the well-known cases: *Wulfsohn v. Russian Socialist Federated Soviet Republic* (1923), 234 N. Y. 372: "Its recognition does not create the state"; *Sokoloff v. National City Bank* (1924), 239 N. Y. 158; *Salimoff & Co. v. Standard Oil Co. of New York* (1933), 262 N. Y. 220.

²⁴ 116 British and Foreign State Papers, p. 438; this JOURNAL, Vol. 18 (1924), p. 147.

and, even more so, by the decision in *United States (George W. Hopkins) v. Mexico*, 1926.²⁵ The constitutive theory is not only untenable on precedent and authority, but also on reason and principle. Lauterpacht has succeeded in dispelling neither the powerful argument of a legal vacuum, of what Cavaglieri admitted constitutes an "*intermezzo agiuridico*," nor the absurdity of the simultaneous existence and non-existence of the same entity. What he has to say is not a legal answer at all, but merely a political prediction: things will not be so bad. It is further clear that a sovereign state cannot be created through recognition by other states; one of the very requirements of international law is independence. No amount of recognitions can supply the lack of the fulfilment of the requirements laid down by international law. Recognition, in such a case, is simply ineffective in law.

A right to, a duty of, recognition has been supported by writers, especially those of the school of natural law, or for political reasons, particularly by Latin American writers,²⁶ who are always fearful that recognition may be made a tool of intervention. But no such norm exists in positive international law; it is a mere postulate *de lege ferenda*. Even if it existed, as Jessup²⁷ pointedly remarks, it would "afford slight satisfaction in the absence of organized international machinery to enforce the obligation." Lauterpacht's proposal of collectivization of recognition has little chance, as actually it has been the usual practice of the United States to refrain from participating in such joint action.²⁸

Even the practice of the two states, to which alone Lauterpacht refers, completely negates a legal right to, and a legal duty of, recognition. It will suffice to cite a few recent examples: The long non-recognition of the effective Soviet Government by the United States: British and American non-recognition of effective *de facto* governments in Bolivia in 1943, and Argentina in 1944; on the other hand, American recognition of the revolutionary government of General Odria in Peru, which at once abolished constitutional guarantees; British and American recognition of the revolutionary governments of the "peoples' democracies" in Europe. As to Israel,²⁹ the United States recognized it *de facto* within a few hours of the declaration of independence, whereas Great Britain declared it will not recognize Israel, because it has not fulfilled the basic criteria of an independent state. Was this contrasting attitude of the two states, to which Lauterpacht restricts himself, in both cases the exercise of an impartial and

²⁵ Opinions of Commissioners, 1927, p. 42; this JOURNAL, Vol. 21 (1927), p. 160.

²⁶ See, recently, Jiménez de Aréchaga, *Reconocimiento de Gobiernos* (1947).

²⁷ Jessup, *op. cit.*, p. 44.

²⁸ Hackworth, *Digest of International Law*, Vol. I (Washington, 1940), p. 178.

²⁹ See Philip M. Brown, "The Recognition of Israel," this JOURNAL, Vol. 42 (1948), pp. 620-627.

judicial attitude? On the other hand, Great Britain has recognized the effective Communist government of China, whereas the United States refuses to recognize it and recognizes the Nationalist Government, which is today reduced to Formosa and, therefore, sits, legally speaking (as no peace treaty with Japan has yet come into force), on Japanese territory. The contrast between the "impartial and judicial" attitude in recognition between the United States and the Soviet Union threatens, as Secretary General Trygve Lie fears, to wreck the United Nations. Both Great Britain and the United States have recognized the new state of Viet Nam and the Bao Dai régime. Has it fulfilled the requirement of independence? The states of the Soviet bloc have recognized the rebel government, India has recognized none, as she holds that the Bao Dai régime is a "puppet government."

In spite of all his dialectic efforts, Lauterpacht must admit that he has been unable to find a clear statement in the practice of states in favor of a legal duty of recognition. But, to the contrary, a study of American state practice discloses with all clarity that international law knows no such duty. Hackworth, whose *Digest of International Law* gives the American practice from 1906 to 1940, clearly states: "The existence in fact of a new state or government is not dependent upon its recognition by other states. Whether and when recognition will be accorded is a matter within the discretion of the recognizing government."²⁰

Mr. Warren Austin, in reply to a strong criticism by Syria of America's quick recognition of Israel, said in sharpest terms that "no country on earth can question the sovereignty of the United States in the exercise of that high political act of recognition of the *de facto* status of a state." Recently, a Pan American draft treaty on recognition was discussed. Article 1 stated that a *de facto* government has the right to be recognized. The American representative made at once a reservation and stated in unmistakable terms: The formulation of conditions of recognition in terms of a right vested in the *de facto* government necessarily implies a legal duty in other states to grant recognition. Adequate basis for any such duty is lacking in existing international law, which on the contrary, delegates to each state the faculty of determining whether and when to grant recognition.²¹

JOSEF L. KUNZ

²⁰ Hackworth, *op. cit.*, p. 161. He also clearly states: "There is no obligation to recognize that a status of belligerency exists." *Ibid.*, p. 391.

²¹ See Alwyn V. Freeman, *loc. cit.*, p. 379.

THE VENEZUELA-BRITISH GUIANA BOUNDARY ARBITRATION OF 1899

*"An arbitrator, whether he be king or farmer, rarely decides on strict principle of law. He has always a bias to try, if possible, to split the difference."*¹

The late Severo Mallet-Prevost, distinguished international lawyer, who served as Secretary of the Commission appointed by President Cleveland to report on the boundary line between Venezuela and British Guiana, and later as Agent and of Counsel for Venezuela before the Paris Arbitration Tribunal in the Guiana Boundary Case, left for one of his law partners, Judge Otto Schoenrich, a member of our Society, an interesting and important memorandum dealing with the Venezuela-British Guiana Boundary Arbitration, which was only to be published after Mr. Mallet-Prevost's death and at the discretion of Judge Schoenrich.

Judge Schoenrich published this memorandum with some explanatory comment in a current note in the July, 1949, issue of the JOURNAL.² We are pleased to publish in this number of the JOURNAL³ a comment by Mr. Clifton J. Child, formerly Commonwealth Fellow, University of Wisconsin, upon Judge Schoenrich's note and Mr. Mallet-Prevost's memorandum.

Mr. Mallet-Prevost's memorandum consists mainly of a statement of facts within his personal knowledge about certain dramatic incidents relating to the way in which the decision of the arbitrators in the British Guiana Boundary Arbitration was brought about by the President of the Tribunal. There are also certain subsidiary and minor statements of fact and opinion and inference. Finally, there is an important statement, not of fact, but of belief and opinion, as to the way in which Mr. Mallet-Prevost thought the attitude of the President of the Tribunal was influenced or controlled by the governments of Great Britain and Russia.

No one who knew Mr. Mallet-Prevost would doubt that the facts which he stated as within his personal knowledge were true to the best of his knowledge and belief. Obviously, his opinions might be mistaken, irrespective of the substantive truth or technical accuracy of his facts.

The essential facts stated by Mr. Mallet-Prevost as within his personal knowledge may be summarized as follows: After the conclusion of the arguments in the British Guiana Boundary Arbitration, and while the Tribunal was considering its judgment, Mr. Mallet-Prevost was sent for by the two American arbitrators, Chief Justice Fuller and Mr. Justice Brewer. When he appeared, Mr. Justice Brewer "excitedly" told him that

¹ Albert Gallatin, Agent of the United States in the Northeastern Boundary Arbitration between the United States and Great Britain, commenting on the award of the King of The Netherlands in that case, quoted by William C. Dennis, in "Compromise—The Great Defect of Arbitration," *Columbia Law Review*, June, 1911, p. 493, at p. 495.

² Vol. 43 (1949), p. 523.

³ *Supra*, p. 682.

M. de Martens, the President of the Arbitral Tribunal, had informed the American arbitrators that the British arbitrators, Lord Chief Justice Russell and Mr. Justice Collins, were ready to decide in favor of the so-called Schomburgk Line (substantially the British contention), and that if the American arbitrators insisted on a line starting at the Moruca River (substantially the Venezuelan contention), he, de Martens, would join with the British arbitrators and make the British line the boundary by the judgment of the majority of the Tribunal; but, de Martens went on to say, he desired a unanimous decision and if the American arbitrators would join with him and accept a compromise line (which lay between the two national contentions), he would secure the agreement of the British arbitrators and a unanimous decision would be given for this compromise line. Mr. Brewer further stated that, under the circumstances, although he and Chief Justice Fuller were of the opinion that the boundary should start at the Moruca River, they were ready either to agree to de Martens' proposal and unite in a unanimous opinion in favor of the compromise line, or refuse and file dissenting opinions from a decision which would then adopt the British line. They left it to Mr. Mallet-Prevost to determine which course he wished them to follow.

Mr. Mallet-Prevost said that the decision was too important for him to make on his sole responsibility and asked permission to consult General Harrison, the Chief Counsel for Venezuela, which was given. General Harrison was very indignant, but finally said: "What Martens proposes is iniquitous, but I see nothing for Fuller and Brewer to do but agree."⁴ So much for Mr. Mallet-Prevost's statement of the essential facts.

Mr. Mallet-Prevost also added a statement, which did not pretend to be a statement of fact but only of opinion and belief, that in view of certain facts, including the foregoing, he had become convinced and still believed "That during Martens' visit to England, a deal had been concluded between Russia and Great Britain to decide the case along the lines suggested by Martens and that pressure to that end had in some way been exerted on Collins (one of the British judges) to follow that course."⁵

Mr. Child devotes most of his comment to a carefully documented argument to show that there is no sufficient basis for Mr. Mallet-Prevost's belief that the decision was the result of a diplomatic "deal" between England and Russia. The present writer has no desire to take issue with Mr. Child on this point. Mr. Mallet-Prevost's belief imputes what would be dishonorable conduct to the Foreign Office of Great Britain, then in the hands of Lord Salisbury, and to the British judges as well as to the Government of Russia and the President of the Tribunal. *Omnia prae-sumuntur rite esse acta*. Mr. Mallet-Prevost's personal statement of fact, already summarized, does not, in the judgment of the writer, reflect on

⁴ This JOURNAL, Vol. 43 (1949), p. 530.

⁵ *Ibid.*

anybody but the President of the Tribunal.⁶ It does not reflect on the British judges any more than on the American judges, and does not touch the governments of Great Britain and Russia at all. Mr. Child would seem to have effectively disposed of certain minor matters of fact, opinion and inference which might tend to support Mr. Mallet-Prevost's belief, and Mr. Mallet-Prevost's opinion on this point would seem to the writer open to a motion to "set it aside as not supported by the evidence."

But it is submitted that this does not in any wise tend to discredit Mr. Mallet-Prevost's statement of the important facts of which he had personal knowledge which show the unjudicial method by which the judgment of the arbitrators was brought about, and this is the important point in Mr. Mallet-Prevost's memorandum, not only as respects the British Guiana arbitration, but as tending to illuminate and illustrate the great defect of arbitration in general, *i.e.*, compromise.⁷

This brings us to the first point which appears to the writer to need clarification; namely, does or does not Mr. Child accept the truth and accuracy of the facts stated by Mr. Mallet-Prevost in his memorandum as a matter of personal knowledge.

Here Mr. Child seems to the writer to be ambiguous and therefore unsatisfactory. His principal concern is evidently to repel Mr. Mallet-Prevost's "belief" in a diplomatic "deal" between Great Britain and Russia. He nowhere directly challenges Mr. Mallet-Prevost's statement of facts within his personal knowledge. In fact, toward the close of his article, when he offers his own explanation of the decision of the court—pressure by the President of the Tribunal on both the British and American arbitrators⁸—he goes a long way toward accepting the facts stated in Mr. Mallet-Prevost's memorandum.

On the other hand, he apparently seeks to throw doubt upon Mr. Mallet-Prevost's statement of fact by pointing out that in the statement which Mr. Mallet-Prevost and General Harrison gave to the press immediately after the decision in 1899,

the only suggestion of impropriety which they made in connection with the award was that it was essentially a compromise. . . . There was no complaint that this compromise resulted from undue pressure upon the judges by the Russian President of the Tribunal . . . Nor was there any appeal to the American judges, as there might reasonably have been, if Mr. Mallet-Prevost's present charge is true, to enter a protest against the false position in which they had supposedly been placed by the President of the Tribunal and to let it be known

⁶ And even as to him, see *infra*, p. 726.

⁷ See this writer's article in *Columbia Law Review*, June, 1911, p. 493, cited *supra*.

⁸ "Indeed, was it not M. de Martens' desire for unanimity which caused him, in bringing both parties to accept a compromise, to put pressure upon the British judges, as well as upon their American colleagues?" *Supra*, p. 689.

that, if they had concurred in the unanimous award of the Tribunal, they had done so against their own better judgments.⁹

With submission, this is a surprising argument. Is Mr. Child trying to say that the fact that Mr. Mallet-Prevost and General Harrison did not break faith and violate the confidence of the two American judges in 1899 is a reason to believe that Mr. Mallet-Prevost was not telling the truth in 1944, when it could properly be told? Mr. Child goes so far as to say: "In fact, apart from the resentment which the Counsel for Venezuela apparently felt against the verdict, there were none of the elements of the story as Mr. Mallet-Prevost now tells it."¹⁰

Of course, Mr. Mallet-Prevost did not need to leave a posthumous memorandum with his law partner to repeat what he and General Harrison had so well said in 1899—that the decision was a compromise, not a judicial decision—something which Mr. Child does not deny, but on the contrary affirms along with others who have studied the case.¹¹ It is submitted that there is not one word in Mr. Mallet-Prevost's statement of 1944 which is inconsistent with what he and General Harrison said in 1899. He simply adds additional matter which he was not at liberty to make public in 1899. Then he said the decision was a compromise. Now he tells how that compromise was brought about.¹²

It is submitted, therefore, that Mr. Child's complaint of the omission in 1899 of those matters which it would not have been permissible or honorable then to disclose, as making it "tempting to assume that, in nursing his grievance against the Tribunal through the years, Mr. Mallet-Prevost allowed his imagination to supply a number of details which were missing from the statement which he and General Harrison made in 1899," is both unjust and unconvincing.¹³ Mr. Child also questions the accuracy of certain minor statements in Mr. Mallet-Prevost's memorandum. For example, he points out that Mr. Mallet-Prevost apparently overlooked the fact that Lord Chief Justice Russell, at the time he dined with him in

⁹ Mr. Child, *supra*, p. 683.

¹⁰ *Ibid.*

¹¹ Mr. Child, *supra*, p. 689. Cf. Mr. Justice Brewer, quoted by Judge Schoenrich, *loc. cit.*, p. 526; the Honorable John W. Foster, Proceedings of the American Society of International Law, 1909, p. 28; article, "Compromise—The Great Defect of Arbitration," Columbia Law Review, June, 1911, pp. 495, 496, etc.

¹² In like manner, any charge in 1899 by Mr. Mallet-Prevost and General Harrison of a diplomatic "deal" under the circumstances then obtaining, and in view of the honorable obligations by which they were bound, would have been unthinkable.

¹³ Child, *supra*, p. 683. Cf. Mr. Child's statement, "It was perhaps only to be expected that some day, after turning the matter over in his mind for so long, Mr. Mallet-Prevost would eventually produce a theory to justify the attack which he and General Harrison, the senior Counsel for Venezuela, launched upon the Tribunal immediately after the award was announced on October 3, 1899." *Supra*, p. 682.

January, was not yet a member of the Arbitral Tribunal. But after all, he subsequently became a member, and presumably Lord Chief Justice Russell as an arbitrator in October held the same views as to the functions of an arbitrator which he had expressed as a diner-out in January, which is Mr. Mallet-Prevost's point. Again, the relative "taciturnity" and "listlessness" of Lord Justice Collins, before and after taking his vacation, is a matter of opinion, rather than statistics, and, it is submitted, is irrelevant and immaterial even by way of impeachment as bearing upon the truthfulness and accuracy of Mr. Mallet-Prevost's essential facts.¹⁴ And finally, it is suggested that no one who has seen much of the inside and outside of arbitral tribunals or other international gatherings would attach any great importance to the pious speeches of the arbitrators or equally unctuous statements of their governments in acclaiming the results reached¹⁵ as showing that Mr. Mallet-Prevost was not wholly correct in his description of the methods by which these results were attained.¹⁶

In view of Mr. Child's suggestion that Mr. Mallet-Prevost's story may have grown with the years, the present writer ventures to adduce his own testimony that Mr. Mallet-Prevost told him this same inside story as to how the Guiana Arbitration Boundary Line was arrived at in all its essential details, thirty-four years before he told it to Judge Schoenrich and made it of record in his memorandum, after receiving the Order of the Liberator in 1944.

In stating the circumstances under which Mr. Mallet-Prevost came to tell me the story of the Guiana Boundary decision, it is more convenient to speak in the first person. From July 1, 1906, to July 1, 1910, I was Assistant Solicitor of the Department of State. Among the important legal matters pending before the Department was a claim against the Mexican Government in which Mr. Mallet-Prevost was counsel for the claimants. It happened that I was assigned to this case by the Department. This led to frequent conferences with Mr. Mallet-Prevost. I was, also, during that period, working on the *Orinoco Steamship* claim against Venezuela, a matter in which I was later appointed Agent of the United States in the arbitration which took place before The Hague Court in 1910. All this naturally led Mr. Mallet-Prevost to take a kindly interest in me as a young lawyer dealing with another Venezuela arbitration, and led him also to tell me the story of his unsatisfactory experience with the Arbitral Tribunal in the Guiana Arbitration. He told me the story very briefly at the close of an interview, but he told it just as he told it later to Judge Schoenrich and in his memorandum, even to his description of the pie-

¹⁴ Child, *supra*, pp. 684, 685.

¹⁵ Child, *supra*, pp. 691-693.

¹⁶ Neither is it surprising that if there was a diplomatic "deal"—which the writer does not believe—the parties to this "deal" left no written record of their misconduct for the diligence of Mr. Child to discover.

turesque language which de Martens' proposition evoked from that devout Presbyterian, General Harrison. No essential fact was left to be supplied by Mr. Mallet-Prevost's "imagination"¹⁷ in 1944. I hasten to add, however, that I do not recollect that Mr. Mallet-Prevost, in telling the story to me, mentioned his belief that the arbitral decision was the result of a British-Russian "deal," as he did in telling the story to Judge Schoenrich and in his memorandum of 1944. For this difference, there are several possible explanations. In the first place, it may be due to faulty recollection on my part; but I do not think so, because the story was of great interest to me, and the telling stands out in my recollection very distinctly to this day. His failure to mention this theory might have been easily due to the fact that he did not think it wise to speak of it to me at that time, but I think it more likely that it was due to the brevity of our conversation on this point which took place just as we parted. Of course, it is possible, as Mr. Child seems to suggest,¹⁸ that Mr. Mallet-Prevost had not at that time come to the conclusion that what happened was the result of a diplomatic "deal"; but even if this last be the true explanation, it would in no wise affect the credibility of Mr. Mallet-Prevost's consistent statement of the facts within his personal knowledge.

It happens that I had another personal contact, or near contact, with this interesting international incident. My conversation with Mr. Mallet-Prevost took place in the State Department Building, and doubtless before July 1, 1910, when I left the Department. At any rate, it took place before I went to The Hague in the late summer and fall of 1910 as Agent of the United States in the *Orinoco Steamship Arbitration* with Venezuela. Shortly after my arrival at The Hague, in accordance with custom and the instructions of the American Legation, I left cards on various members of the diplomatic corps, among them Sir George Buchanan, the then British Minister at The Hague, who had been the British Agent in the British-Venezuelan arbitration over the Guiana Boundary in 1899. Sir George returned the call and I subsequently met him and we fell into conversation which naturally, under the circumstances, turned to the British Guiana-Venezuela Boundary Line Arbitration. I regret that I cannot recall my conversation with Sir George as clearly and definitely as I do the conversation with Mr. Mallet-Prevost. Aside from our mutual assumption that the Guiana Boundary Line decision was a compromise, the thing which stands out in my memory most clearly is his criticism of the detail into which both Sir Richard Webster, the British Attorney General, and Mr. Mallet-Prevost went in their arguments before the Arbitral Tribunal.¹⁹ I do know, and I know that I thought at the time, that what Sir George said did not leave in my mind the slightest reason to doubt the inside story of the

¹⁷ Child, *supra*, p. 683.

¹⁸ *Supra*, pp. 682, 683.

¹⁹ Child, *supra*, p. 686.

way in which the decision was reached as told me by Mr. Mallet-Prevost. On the contrary, the impression which I carried away was that which is suggested by Mr. Child himself, namely, that M. de Martens had "put pressure upon the British judges, as well as upon their American colleagues,"²⁰ and my "belief" is that it was undoubtedly of the same nature, i.e., that de Martens threatened the British judges that he would decide with the Americans unless they agreed to his compromise line, in the same way that he threatened the Americans that he would side with the British unless they made the compromise line unanimous.

Having said this, I hasten to add that such conduct on the part of the President of the Tribunal, however "iniquitous" it seems when tested by Anglo-American judicial standards, does not, in my judgment, imply conscious wrong-doing on the part of the President. As John W. Foster has pointed out, de Martens "was not a lawyer by profession, but had received his training in the Russian Foreign Office."²¹ He was using diplomatic, not judicial, methods, and rather strenuous diplomatic methods; but, as Mr. Root has said,

Arbitrators too often act diplomatically rather than judicially; they consider themselves belonging to diplomacy rather than to jurisprudence; they measure their responsibility and their duty by the traditions, the sentiments, and the honorable obligation which have grown up in centuries of diplomatic intercourse, rather than by the traditions, the sentiments, and the sense of honorable obligation which characterize the judicial departments of civilized nations.²²

De Martens' background did not qualify him to respond to the appeal which General Harrison addressed to him in his closing argument of the Guiana Arbitration, when he said, referring to the proposals for a permanent international tribunal which had just been under consideration at the First Hague Conference of 1899 in which de Martens had sat as a Russian delegate:

If conventions, if accommodations, and if the rule of give-and-take are to be used, then let the diplomatists settle the questions. But when these have failed in their work, it seems to me necessarily to imply the introduction of a judicial element into the Tribunal.²³

We have made real advances in the past half-century toward a truly judicial tribunal. The decisions of the Hague Court marked an advance in this respect over the decisions of the *ad hoc* commissions and tribunals

²⁰ *Ibid.*, p. 689.

²¹ Proceedings of the American Society of International Law, 1909, p. 28.

²² Proceedings, National Arbitration and Peace Conference, April 15, 1907, p. 44; quoted article, "Compromise—The Great Defect of Arbitration," *loc. cit.*, p. 495, note.

²³ Quoted by John W. Foster, Proceedings of the American Society of International Law, 1909, p. 27.

which preceded it.²⁴ The decisions of the World Court show still further progress. We cannot claim even yet to have reached the stage where the element of compromise is eliminated as completely from international, as it has been from national, judicial proceedings (and it has not and probably never will be completely eliminated from any human procedure); but we can hope and even reasonably expect that there will never be occasion for anyone to write a memorandum about a decision of the World Court similar to that of Mr. Mallet-Prevost which is under discussion.

In conclusion, it is submitted: First, there is no doubt of the truthfulness and substantial accuracy of Mr. Mallet-Prevost's memorandum so far as it relates to matters of fact within his personal knowledge. Second, the Mallet-Prevost memorandum affords definite and conclusive evidence of what practically everyone who had studied the Guiana Boundary Case was already convinced and many had said, namely, that the decision was a diplomatic compromise and not a truly judicial decision. Third, while the methods of the President of the Tribunal in securing a unanimous compromise in this case are somewhat less—or should we say more—"diplomatic" than those ordinarily used, they are, in principle, typical of much of the international arbitral procedure of the past. Fourth, the principal purpose of this editorial is to make a contribution, however slight, to the process of making certain that they are not typical of the arbitral procedure of the future.

WILLIAM CULLEN DENNIS

²⁴ Columbia Law Review, 1911, p. 498, at pp. 496, 502.

CURRENT NOTES

INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY, AND RUMANIA, ADVISORY OPINIONS OF THE INTERNATIONAL COURT OF JUSTICE

As a result of the Potsdam Conference of July, 1945, the Council of Foreign Ministers was charged with the preparation of the treaties of peace with Italy, Bulgaria, Hungary, Rumania, and Finland. Discussions on the treaties began in London in September, 1945, and their final drafting was completed at the November-December, 1946, meeting of the Council. The treaties were signed on February 10, 1947, and came into effect on September 15, 1947. One of the principal difficulties encountered in the preparation of the treaties lay in the settlement of disputes provisions. The United States proposal of reference of disputes to the International Court of Justice was accepted by the Paris Conference,¹ but Molotov insisted that resort should be had to the Ambassadors of France, Great Britain, Russia and the United States at Rome. This attitude reflected the Soviet position that it "prefers for inter-governmental disputes related to political matters the procedure of diplomatic action and conciliatory commissions," rather than the binding decisions of international arbitral tribunals.² At the New York meeting of the Council of Foreign Ministers on December 5, 1946, Molotov finally acceded to the principle that arbitration would be resorted to for the final settlement of disputes after diplomatic negotiation had failed. However, the International Court of Justice was not to be the body utilized for this purpose but rather special *ad hoc* commissions.³

¹ Department of State, *Making the Peace Treaties, 1941-1947* (Department of State Publication 2774, European Series 24, 1947), p. 44.

² *Institut Prava Akademii Nauk S.S.S.R., Mezhdunarodnoe Pravo* (Moscow, 1947), p. 475.

³ N. Y. Times, Dec. 6, 1946, p. 1, col. 1; see Domke, "Settlement-of-Disputes Provisions in Axis Satellite Peace Treaties," this JOURNAL, Vol. 41 (1947), p. 911. Thus Art. 36 of the treaty with Bulgaria provided (to which corresponded *mutatis mutandis* Art. 40 of the treaty with Hungary and Art. 38 of the treaty with Rumania):

"1. Except where another procedure is specifically provided under any article of the present Treaty, any dispute concerning the interpretation or execution of the Treaty, which is not settled by direct diplomatic negotiations, shall be referred to the Three Heads of Mission acting under Article 35, except that in this case the Heads of Mission will not be restricted by the time-limit provided in that Article. Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of

Two advisory opinions of the International Court of Justice rendered under date of March 30 and July 18, 1950,⁴ respectively, have interpreted the provisions of the Peace Treaties regulating the settlement of disputes and in so doing have laid down principles of considerable importance relating to the process of international arbitration. The developments which led to the reference to the Court of the question of the interpretation of these treaties have previously been set forth in this JOURNAL.⁵

The United States and the United Kingdom had charged before the General Assembly that the governments of Bulgaria, Hungary, and Rumania had denied their peoples the human rights and fundamental freedoms which these governments had guaranteed under the Peace Treaties.⁶ Thereafter the treaty procedure for the settlement of the disputes was duly followed and exhausted by the United States and the United Kingdom. Accordingly, Bulgaria, Hungary, and Rumania were on August 1, 1949, requested to join in forming the commissions called for under the treaties.⁷ These governments failed to comply with this request, taking the position that they were duly fulfilling the Peace Treaties and that consequently no disputes existed.⁸ The additional developments were brought to the attention of the General Assembly, which on October 22, 1949, adopted a resolution referring a series of four questions to the International Court of Justice for advisory opinions.⁹

The Court's opinion on the first two of these questions¹⁰ was rendered March 30, 1950, under the caption "Interpretation of Peace Treaties with Bulgaria, Hungary and Romania." The Court decided, by eleven votes to three, that it had jurisdiction of the case; that disputes existed to which

one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.

"2. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding." (This JOURNAL, Supp., Vol. 42 (1948), pp. 193, 242, 268.)

The Three Heads of Mission so referred to were those of the Soviet Union, United Kingdom, and United States (Article 35).

⁴ This JOURNAL, pp. 742, 752.

⁵ Hudson, "The Twenty-Eighth Year of the World Court," this JOURNAL, Vol. 44 (1950), p. 1, at p. 24; see also Liang, Notes on Legal Questions concerning the United Nations, *ibid.*, p. 100.

⁶ *E.g.*, Bulgarian Treaty, Art. 2; this JOURNAL, Supp., Vol. 42 (1948), p. 180.

⁷ *E.g.*, United States note to Bulgaria, Aug. 1, 1949, U.N. Doc. A/985, Sept. 23, 1949, p. 59.

⁸ *E.g.*, Bulgarian note to the United States, Sept. 1, 1949, *ibid.*, p. 63.

⁹ U.N. Doc. A/1043, Oct. 22, 1949.

¹⁰ Such questions were, first, whether the diplomatic exchanges concerning the obligations of the former Axis satellite states under the political provisions of the Peace Treaties disclosed disputes subject to the settlement-of-disputes provisions of such treaties; and, secondly, in the event of an affirmative reply to the first question, whether such states were obligated to carry out such settlement-of-disputes provisions, including the appointment of their national representatives to the treaty commissions.

were applicable the articles of the Peace Treaties concerning the settlement of disputes; and that the governments of Bulgaria, Hungary, and Rumania were under a duty of carrying out their obligations under such articles. Judge Azevedo (Brazil) rendered a separate concurring opinion and Judges Winiarski (Poland), Zorićić (Yugoslavia), and Krylov (Soviet Union) rendered dissenting opinions.

Was the General Assembly's request for an advisory opinion an attempt to circumvent the principle that the consent of the parties to a dispute is the only basis of an international court's jurisdiction to decide such dispute?¹¹ This was the principal question dealt with by the Court in its opinion of March 30, 1950. The decision of the Permanent Court of International Justice in the *Eastern Carelia Case*¹² was closely in point. In that case the Permanent Court of International Justice was asked for an advisory opinion concerning the Treaty of Peace between Finland and Russia of October 14, 1920, and one of the parties to the dispute arising under such treaty, namely, Russia, contested the jurisdiction of the Court. In its opinion the Permanent Court of International Justice noted that the essential point at issue was whether a certain Declaration made by Russia and attached to the treaty was a part of the treaty obligations or whether, as Russia contended, it was merely for the information of Finland. Since Russia was not a Member of the League and had not consented to the decision of this question by the Permanent Court of International Justice, the Court ruled that it was unable to give the advisory opinion requested.¹³

The International Court of Justice in its opinion of March 30, 1950, refused so to limit its jurisdiction in advisory opinion procedure. It recognized that an advisory opinion relating to a legal question actually pending between states would not be binding upon them. But it refused to let the fact that states might have an interest in an advisory opinion proceeding preclude it from exercising its jurisdiction in an appropriate case. Its remarks in this connection were as follows:

The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's

¹¹ See Carlston, *The Process of International Arbitration* (New York, 1946), sec. 21.

¹² Request for Advisory Opinion concerning the Status of Eastern Carelia (July 23, 1923), Advisory Opinion No. 5, Ser. B, No. 5.

¹³ The Court did not refer to the case of the *Frontier between Iraq and Turkey* (Series B, No. 12), in which the Permanent Court of International Justice rendered an advisory opinion concerning the authority of the League Council under the Treaty of Lausanne to settle a dispute between Turkey and Great Britain in regard to the Iraq-Turkey frontier, notwithstanding that Turkey, a non-member of the League, had not given its consent thereto and had contended that the questions involved were of a political character not capable of judicial settlement.

reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations," represents its participation in the activities of the Organization, and, in principle, should not be refused.

The General Assembly's resolution of October 22, 1949, in effect provided that if the International Court of Justice should rule, as it in fact did, that disputes existed which Bulgaria, Hungary, and Rumania were obligated to submit to the procedure provided in the Peace Treaties, thirty days should be allowed such countries in which to appoint their representatives to the Treaty Commissions. If they should fail to notify the Secretary General of such appointments within such period, and the Secretary General should so advise the Court, then the Court was to render an advisory opinion on two additional questions. These were: First, if one party should fail to appoint its representative to the Treaty Commission where obligated to do so, is the Secretary General empowered to appoint the third member of the Commission upon the request of the other party to the dispute? Secondly, in the event of an affirmative answer to the preceding question, would a commission so composed, i.e., a representative of one party and a third member appointed by the Secretary General, be "competent to make a definitive and binding decision in settlement of a dispute?"

The Court in an advisory opinion rendered July 18, 1950, decided that the Secretary General was not in the circumstances authorized to make the appointment of the third member of the Treaty Commission. It noted that it was accordingly not necessary for it to answer the remaining question as to the competence of a tribunal so constituted.

In making this decision the Court again demonstrated that it is above all a court of law, and that, when law and policy conflict, nations may have confidence that the Court will reach its decisions on a basis of law.

Despite the fact that there were only two dissenting judges, Judge Read (Canada) and Judge Azevedo (Brazil), the decision was not an easy one for the Court to make. It was, as Judge Read noted in his dissent, faced with the fact that on its opinion depended the efforts of the United Nations to preserve human rights and fundamental freedoms in the countries involved. A negative answer to the questions asked the Court would create a stalemate in the enforcement of the human rights provisions of the Peace Treaties. An issue of even greater gravity faced by the Court was whether, in view of the establishment of an international community in the United Nations, the Court should today recognize the sovereign power (though not necessarily the legal right) of a state unilaterally to disregard

its treaty obligations and to frustrate the achievement of the purpose of the treaty. Finally, a negative answer would affirm the lack of any power in the international community to enforce specifically an international engagement to arbitrate future disputes.

There were cited to the Court two international precedents to justify an affirmative decision sustaining the authority of the Secretary General to make the appointment of the third member. In two instances it has been held that an international tribunal has the power to decide cases despite the withdrawal of an arbitrator under instructions from his government. Presiding Commissioner Verzijl and the French Commissioner so held in connection with the withdrawal of the Mexican Commissioner, Agent and secretary from the French-Mexican Mixed Claims Commission established under the convention of September 25, 1924.¹⁴ Umpire Roberts so held in connection with the withdrawal of the German Commissioner and Agent from the German-American Mixed Claims Commission under the agreement of August 10, 1922.¹⁵ The force of the first precedent, however, was considerably weakened by the fact that the two governments concerned did not accept as binding the decisions made by the tribunal lacking in membership of the third member and submitted such claims anew to a commission constituted under a convention dated August 2, 1930.¹⁶ It does not appear that this circumstance was brought to the attention of the Court.¹⁷ Analogous cases also cited to the Court were the *Lena Goldfields Co. Arbitration*¹⁸ and *Colombia v. Cauca Co.*¹⁹

It is only the first step in the judicial process, however, to collect precedent; the function of the judge lies in the analysis of precedent. A leading authority on private arbitration under domestic law has pointed out that all the members of an arbitral tribunal need to be present in the consideration of a case because of "the right of each of the parties to the counsel and influence of each arbitrator with every other arbitrator on the

¹⁴ Feller, *The Mexican Claims Commissions, 1923-1934* (New York, 1935), pp. 72-73.

¹⁵ Mixed Claims Commission, U. S.-Germany, *Opinions and Decisions in the Sabotage Cases*, handed down June 15 and Oct. 30, 1939, p. 310; see also this JOURNAL, Vol. 33 (1939), p. 770.

¹⁶ Feller, *op. cit.*, at p. 76.

¹⁷ Written Statement of the United States of America on Questions III and IV submitted to the International Court of Justice by the United Nations General Assembly in Resolution 294 (IV), dated Oct. 22, 1949; Certain Procedural Questions relating to the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Statements in Court (February-March 1950). It is not known, however, whether all of the relevant documents produced before the Court had reached this country at the time of this writing.

¹⁸ Lauterpacht, *Annual Digest, 1929-1930*, p. 426.

¹⁹ 190 U. S. 524 (1903); but *cf.* Irish Free State case (1924), Lauterpacht, *op. cit.*, 1923-1924, p. 868.

board upon the whole case.”²⁰ The writer has elsewhere had occasion to summarize the applicable law in international arbitration as follows:

The parties are entitled to a decision emanating from the tribunal designated by them in the *compromis*, in its capacity as a tribunal, not as the personal opinions of its members, joined in by a majority of the arbitrators, rendered after due and joint deliberation, and supported by reason. All these conditions are essential to the validity of the tribunal's decision.

.....

They [the members of the tribunal] are selected, not as individual arbitrators, but as members of a judicial body. Accordingly, their judgment must be exercised, not in separate solitude, but in joint discussion, debate, and deliberation with one another as a single judicial body.²¹

The Court in its opinion of July 18, 1950, reached the conclusion that:

In these circumstances, the appointment of a third member by the Secretary-General, instead of bringing about the constitution of a three-member Commission such as the Treaties provide for, would result only in the constitution of a two-member Commission. A Commission consisting of two members is not the kind of commission for which the Treaties have provided. The opposition of the Commissioner of the only party represented could prevent a Commission so constituted from reaching any decision whatever. Such a Commission could only decide by unanimity, whereas the dispute clause provides that “the decision of the majority of the members of the Commission shall be the decision of the Commission and shall be accepted by the parties as definitive and binding.” Nor would the decisions of a Commission of two members, one of whom is appointed by one party only, have the same degree of moral authority as those of a three-member Commission. In every respect, the result would be contrary to the letter as well as the spirit of the Treaties.

The Court said that “it is clear that refusal to fulfill a treaty obligation involves international responsibility.” It then proceeded to point out that:

Nevertheless, such a refusal cannot alter the conditions contemplated in the Treaties for the exercise by the Secretary-General of his power of appointment. These conditions are not present in this case, and their absence is not made good by the fact that it is due to the breach of a treaty obligation. The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them.

²⁰ Sturges, A Treatise on Commercial Arbitration and Awards (Missouri, 1930), sec. 205.

²¹ Carlston, *op. cit.*, at pp. 42-43; see generally in this connection, *ibid.*, secs. 11-14.

It sought to distinguish the precedents above referred to on the ground that:

These cases presuppose the initial validity of a commission, constituted in conformity with the will of the parties as expressed in the arbitration agreement, whereas the appointment of the third member by the Secretary-General in circumstances other than those contemplated in the Treaties raises precisely the question of the initial validity of the constitution of the Commission. In law, the two situations are clearly distinct and it is impossible to argue from one to the other.

Judge Azevedo in his dissent was quick to note the lack of logical foundation for the Court's distinction. For the lack of authority of a tribunal not constituted as required by the *compromis* is as real in a case involving the original constitution and establishment of the tribunal as it is in a case involving the later withdrawal of a member. Such lack of authority in both instances flows from lack of consent; in each instance no consent has been given to the assumption of jurisdiction by a tribunal constituted in a manner other than that prescribed by the *compromis*. It is true that such lack of consent, as the Court in this case noted, may at the same time involve a breach of the *compromis* by the government which either has failed to appoint its arbitrator or has withdrawn its arbitrator. The fact of the breach will not, however, cure the defect of lack of jurisdiction—unfortunate as such a result may be to the development of the international community. The tribunal is the creature of the *compromis* and of the parties. Such is the settled status of the law relating to international arbitral tribunals, as the Court was constrained to recognize. The substantial unanimity of the Court, despite the fact that assuredly some of the judges would have preferred a different result, testifies to the strength of the principle laid down by the Court.

This is not to say, however, that the distinction made by the Court is without substance. The Presiding Commissioner of the French-Mexican Mixed Claims Commission, in sustaining the power of a two-member tribunal to render awards notwithstanding the absence of a third member, noted expressly as a reason for his decision the fact that he was dealing with claims which had been previously argued and on which the oral arguments had been declared closed or could be so declared without inconvenience.²² In other words, in that case both parties had been heard and had presented their arguments, a circumstance lacking in the instant case. In the present circumstances, to sustain the power of a two-member tribunal to render

²² "Considérant qu'au cours de la troisième session de la Commission, un certain nombre d'affaires ont été plaidées, que, pour la plupart, les débats ont déjà été déclarés clos et que, pour les autres, ils peuvent encore l'être sans inconvénient." *Recueil Général Périodique et Critique des Décisions, Conventions et Lois Relatives au Droit International Public et Privé*, 1936, Pt. 2, p. 11.

binding decisions would not only ignore basic principles of jurisdiction, as above discussed, but would also ignore the fundamental procedural rule of the right to be heard.²³

The negotiation as well as the terms of the Peace Treaties lend support to the interpretation adopted by the Court. The reluctance of the Soviet Union to relinquish the modes of settlement of diplomatic negotiation and conciliation in favor of binding arbitral settlement; the necessity under the pertinent treaty provisions of a successive exhaustion of the means of "direct diplomatic negotiations" and decision by the "Three Heads of Mission"; the care with which was hedged about the appointment of the third member, contrasted with the fact that the other two members were simply designated as a "representative of each party"—all reinforce the conclusion that none other than a commission composed of three members as described in the treaty would have the power to arbitrate disputes.

It should be observed that the third member of the tribunal was not to act as an umpire, intervening only in the event of disagreement between the two national commissioners,²⁴ but instead was to be on a parity with the other commissioners and to act with them, in the name of the tribunal and as a part thereof, in reaching decisions.

It was contended before the Court that, insofar as the language of the treaty provisions was concerned, there were no express conditions precedent to the power of the Secretary General to make the appointment of a third member other than the presentation to him of a request from *either party* that such appointment be made. While the Court admitted that "the text in its literal sense does not completely exclude the possibility of the appointment of the third member before the appointment of both national Commissioners," it found that

... according to the natural and ordinary meaning of the terms it was intended that the appointment of both the national Commissioners should precede that of the third member. This clearly results from the sequence of the events contemplated by the article: appointment of a national Commissioner by each party; selection of a third member by mutual agreement of the parties; failing such agreement within a month, his appointment by the Secretary-General. Moreover, this is the normal order followed in the practice of arbitration, and in the absence of any express provision to the contrary there is no reason to suppose that the parties wished to depart from it.

The Secretary-General's power to appoint a third member is derived solely from the agreement of the parties as expressed in the disputes clause of the Treaties; by its very nature such a clause must be strictly construed and can be applied only in the case expressly provided for therein. The case envisaged in the Treaties is exclusively that of the failure of the parties to agree upon the selection of a third

²³ Carlston, *op. cit.*, sec. 10.

²⁴ *E.g.*, Art. 2, Agreement of Aug. 10, 1922, providing for the German-American Mixed Claims Commission, this JOURNAL, Supp., Vol. 16 (1922), p. 171, at p. 172.

member and by no means the much more serious case of a complete refusal of cooperation by one of them, taking the form of refusing to appoint its own Commissioner. The power conferred upon the Secretary-General to help the parties out of the difficulty of agreeing upon a third member cannot be extended to the situation which now exists.

The Court referred to arbitral practice to reinforce its interpretation of the treaty provisions, noting that:

An examination of the practice of arbitration shows that, whereas the draftsmen of arbitration conventions have very often taken care to provide for the consequences of the inability of the parties to agree on the appointment of a third member, they have, apart from exceptional cases, refrained from anticipating a refusal by a party to appoint its own commissioner. The few Treaties containing express provisions for such a refusal²⁵ indicate that the States which adopted this course felt the impossibility of remedying this situation simply by way of interpretation. In fact, the risk of such a possibility of a refusal is a small one, because normally each party has a direct interest in the appointment of its commissioner and must in any case be presumed to observe its treaty obligations. That this was not so in the present case does not justify the Court in exceeding its judicial function on the pretext of remedying a default for the occurrence of which the Treaties have made no provision.

In last analysis, the Court was faced with a problem in the pace of growth of international jurisprudence. To what extent do the powers and functions of the United Nations constitute a solidarity of the international community that will no longer permit of the anarchic tendencies inherent in the classic concept of a system of sovereign states? Judge Azevedo put this aspect of the problem before the Court in the following words:

In this way a strict interpretation limited to an examination of one text only and which takes as its data a partial intention of the parties, cannot, in my view, prevail, especially if it confirms the complete

²⁵ Such a treaty provision was involved in the famous *Hungarian Optants Case*. Art. 239 (a) of the Treaty of Trianon of June 4, 1920, provided for the creation of Mixed Arbitral Tribunals composed of three members, two to be appointed by each government concerned, and a President to be chosen by agreement between them. In addition to a clause dealing with a case of failure to reach an agreement on the appointment of the President, the article provided a means for the appointment of a substitute arbitrator in case of a vacancy which the government concerned failed to fill within due time. *British and Foreign State Papers*, Vol. 113, 1920, pp. 599-600; this *JOURNAL*, Supp., Vol. 15 (1920), pp. 108-109. After the withdrawal of the Rumanian arbitrator in the agrarian cases, Hungary applied to the Council of the League of Nations for appointment of deputy arbitrators pursuant to the treaty. Application by the Hungarian Government to the Council of the League of Nations of May 21, 1927, Annex, B.2, pp. 3, 25. Eventually the Council recommended a solution involving the reconstitution of the Mixed Arbitral Tribunal. *League of Nations Official Journal*, Vol. 9, 1928, p. 446. An account of the dispute, with references to the relevant literature, will be found in *Carlston, op. cit.*, secs. 37 and 56.

breakdown of the whole machinery for solving the disputes, although it be recognized in theory that a responsibility arises from the fact that an international obligation has been violated.

Law and practice on the exact point at issue before the Court, while exhibiting some tendencies towards a recognition of the interests of the international community, were on the whole relatively clear and support the conclusion reached by the Court. That conclusion, moreover, is not necessarily in conflict with the interests of the international community. There is an interest in maintaining the regularity of legal processes. There is an interest in the existence of an international judicial body which exhibits impartiality and respect for law in its decisions. There is an interest in preserving the system of international arbitration itself and not subjecting it to unanticipated stresses that may discourage resort to it by states. For the process of international arbitration is above all a legal process, and the confidence of states that established legal principles will be respected and applied, when reliance thereon is had, must not be abused.

KENNETH S. CARLSTON

ON THE STATUS OF INTERNATIONAL LEGISLATION

In pursuance of Article 24 of its Statute, the International Law Commission of the United Nations began at its first session a consideration of "ways and means for making the evidence of customary international law more readily available." It invited its Chairman to prepare a working paper on the subject which the latter undertook to present at the second session.¹ The first steps have thus been taken to satisfy a long felt need.

However, because of these efforts in the field of customary international law, means for making the evidence of international conventional law, in particular, of what is called "international legislation" more readily available, should not be overlooked. It is true that the texts of international conventions and agreements are more or less easily accessible through the various national and international treaty collections,² and that there is even a special collection of "multipartite international instruments of general interest," namely, Hudson's *International Legislation*, which begins with the Covenant of the League of Nations. It is true that these collections contain, moreover, information on the status of the conventions, such as entry into force, ratifications, accessions, reservations, denunciations, etc. And it is also true that there exist special publications exclusively devoted to such information. These, however, are concerned with

¹ United Nations, Report of the International Law Commission (First Session), U.N. Doc. A/925, pp. 5-6; this JOURNAL, Supp., Vol. 44 (1950), p. 11.

² For a detailed survey of the various kinds of available sources, see A. D. Roberts, "Searching for the Texts of Treaties," The Journal of Documentation, Vol. 5 (1949), pp. 136 ff.

certain groups of treaties only, and though much progress has been made in this respect recently, as the following examples show, there is as yet no comprehensive up-to-date publication concerning the status of international legislation in general.

In the case of "Treaties and Other International Acts" to which the United States of America is a party, two Department of State publications give their status as of December 31, 1932, and 1941, respectively.³ A new loose-leaf service called *United States Treaty Developments* and designed to replace these publications was inaugurated in 1948 by the same Department. The first four releases cover some 800 treaties and eventually the service, which is to be kept up to date, will constitute a "comprehensive guide to official material respecting all treaties and other international agreements to which the United States has become a party in nearly two centuries of treaty-making."⁴ The more the United States participates in multipartite conventions, the greater will the value of this compilation prove to be to scholars inside and outside this country.

As for inter-American treaties, the Pan American Union keeps a record of all developments concerning their "approval, ratification and promulgation" and issues semi-annual charts called the *Status of the Pan American Treaties and Conventions*.⁵

With regard to "agreements and conventions concluded under the auspices of the League of Nations," detailed information concerning their status was provided regularly in the annual lists published by the League Secretariat.⁶ These included also the international labor conventions the status of which is now shown on charts issued by the International Labor Office.

The latest publication of this kind is the first list of *Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depository*, issued in November, 1949, by the United Nations Secretariat. Being restricted to "instruments for which, by their terms, the Secretary-General is appointed as depository," the list is, unfortunately, limited in scope. It does not comprise all the multipartite conventions concluded under the auspices of the United Nations, not even the instruments concerning all the specialized agencies. It does not include all the multipartite treaties "registered" or "filed and recorded" with the Secretariat and published in the *United Nations Treaty Series*.⁷ And it does not

³ Department of State Publications 436 and 2103. As for developments which occurred during 1944, see Publication 2408.

⁴ *United States Treaty Developments* (Publication 2851), preface; see also H. W. Briggs, this JOURNAL, Vol. 44 (1950), pp. 370 ff.

⁵ *Annals of the Organization of American States*, Vol. 1 (1949), p. 181.

⁶ The last issued is the twenty-first, dated July 10, 1944, with its supplement of July 31, 1946; see League of Nations Official Journal, Spec. Supps. No. 193 and No. 195.

⁷ Cf. Art. 10 of the Regulations of Dec. 14, 1946, to give effect to Art. 102 of the

keep up to date the information on the status of the agreements concluded under the auspices of the League of Nations, except where the General Assembly adopted protocols providing for their amendment. Thus one more publication is added to the number of those which are concerned only with certain categories of multipartite conventions and which, moreover, overlap in part.

Instead, an incomparably more useful purpose would be served, it is submitted, if this publication of the world organization were also world-wide in scope, and if the United Nations Secretariat undertook to function as an "International Civil Registry for International Legislation" issuing annual lists of all multipartite conventions in force or likely to come into force, together with all relevant data concerning their status. Under the existing law the Secretariat would—and does—obtain part of the necessary material from Members which are obliged to register with it agreements entered into after the coming into force of the Charter (Article 102 of the Charter). Going a step further, the General Assembly, at its first session, instructed the Secretary General to invite Members to transmit, moreover, treaties concluded "in recent years" but before the Charter became effective, and to receive from non-Members treaties entered into both before and after the coming into force of the Charter which they may voluntarily transmit.⁸ At the same session the General Assembly furthermore declared the willingness of the United Nations to accept the custody of the international instruments formerly in the custody of the League of Nations and to charge the Secretariat with the task of performing the "functions pertaining to a secretariat" (such as the receipt of additional signatures, of ratifications, denunciations, etc.) formerly entrusted to the League.⁹ To complete these efforts, the General Assembly could invite the Governments of Members and non-Members, in particular those which act as depositories of the original instruments, to forward the relevant data concerning not only the treaties included in the above-mentioned categories, but relative to all multipartite conventions in force or likely to come into force, and instruct the Secretary General to publish this material periodically. Reliable up-to-date information on the status of international legislation would then be readily available.

SALO ENGEL

Charter, in United Nations, Treaty Series, Vol. 1, pp. xx ff. Statements concerning these treaties are issued monthly by the Legal Department of the Secretariat in conformity with Art. 13 of the same Regulations.

⁸ Cf. United Nations, General Assembly, Official Records, 1st Sess., Pt. I, Plenary Meetings, pp. 377, 593.

⁹ *Ibid.*, pp. 401, 599.

PRIZES INSTITUTED BY JAMES BROWN SCOTT IN MEMORY OF HIS MOTHER
AND HIS SISTER JEANNETTE SCOTT

The Institute of International Law announces the subject for the Scott Prize (1200 Swiss francs) to be awarded in 1952. The subject is the following:

"A critical study of the legal status of the *continental shelf* and of the questions involved in the use of the sea above it and of its sea-bed and subsoil, beyond the outer limit of the territorial waters."

The competition is open to anyone, except members or associates, or former members or associates, of the Institute.

The essays submitted should be unpublished manuscripts of not less than 150 nor more than 500 pages corresponding to a printed octavo page of the same character as a page of the 1948 volume of the *Annuaire de l'Institut de Droit International*. Essays may be written in English, French, German, Italian, or Spanish. They should be sent anonymously and in three copies. Each copy must be supplied with two mottoes. The same mottoes should be inscribed on an accompanying envelope containing the surname and first names, the date and the place of birth, the nationality and the address of the author. The essays must be in the hands of the Secretary General of the Institute (M. Hans Wehberg, 1 avenue de la Grenade, Geneva) not later than December 31, 1951.

The revised conditions of the Prize will be found in the *Annuaire de l'Institut de Droit International* for 1950, which will be published at the beginning of 1951. They are published also in the *Friedens-Warte* (Basel), 1950, No. 2.

OLD AND NEW INTERNATIONAL PUBLICATIONS

With the recession of World War II into the historical background, and pending the development of any further disturbances of a similar character, it is encouraging to observe the further¹ reappearance of familiar organs of international scholarship and the emergence of new ones. For obvious reasons most of these developments take place on the European side of the Atlantic; no great changes are noticeable in this quarter.

Thus we have an announcement of the reappearance of the *Journal du Droit International* (Clunet) in the trilingual English, French, and German edition. The format is to be enlarged and 1280 pages are promised per year. A special number is being planned for later publication to cover the gap (1946-1949) since the last appearance of the *Journal*.

At the same time *Die Friedens-Warte* celebrates its fiftieth anniversary and begins a new career. It now emerges in a new format, replacing the long familiar *schwarz-weiss-rot* with a dignified but uninteresting buff,

¹ See this JOURNAL, Vol. 41 (1947), pp. 145, 456, 659, 660, Vol. 42 (1948), pp. 633, 648, and Vol. 43 (1949), pp. 345, 792, for earlier items of this character.

at the hands of the *Verlag für Recht und Gesellschaft A. G.*, Basel. Happily, however, Professor Wehberg continues as editor.

Two new Spanish reviews have begun their appearance in Madrid. One is called (*Cuadernos de*) *Politica Internacional* and is published by the *Instituto de Estudios Politicos* under an editorial board of which Camilo Barcia Trelles is a member. It contains principal articles, notes and chronicles, book reviews, and documents. Its center of interest is found in international political relations, but the juridical aspect of things inevitably comes in for a certain amount of notice. In the *Estudios Internacionales y Coloniales* on the other hand, we have a mixture of politics and law and economics. Publication, under the auspices of the *Sociedad de Estudios Internacionales y Coloniales*, was begun in 1948 and the first two volumes (1948 and 1949) have just been received. They contain articles, notes and texts on a variety of problems (Palestine, Pakistan, Gibraltar, the Antarctic, and other regions) and devote a good deal of attention to the United Nations. In each number is found a brief account of activities of the *Sociedad*.

P. B. P.

INCORPORATION OF THE SOCIETY

On September 20, 1950, Public Law 794, 81st Congress, 2nd Session, An Act to incorporate the American Society of International Law, was signed by President Truman. On November 11, 1950, a special meeting of the Executive Council of the Society was held at which the charter of incorporation was accepted and arrangements made for transfer of the assets and property of the unincorporated body to the corporation on May 1, 1951, after the corporation is completely organized. This action was taken pursuant to the resolution passed at the annual meeting of the Society on April 28, 1950,¹ in anticipation of passage of the Act of Congress.

Preliminary organization of the new corporation was also effected on November 11, 1950. A meeting was held of the persons named in the Act as constituting the initial governing board or Executive Council of the corporation. This body accepted the charter, chose Manley O. Hudson as its chairman, and directed that a business meeting of all members of the incorporated Society be called for April 28, 1951, to complete the organization of the corporation, elect officers and take such other action as may be necessary under the provisions of the statute.

The text of the Act of Congress, together with the texts of the resolutions adopted on November 11, 1950, will appear in the January, 1951, issue of the Journal.

EDWARD DUMBAULD,
Secretary

¹ See Proceedings, 1950, p. 60.

JUDICIAL DECISIONS

By WILLIAM W. BISHOP, JR.

Of the Board of Editors

INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY AND ROMANIA. I. C. J. Reports, 1950, p. 65.*

International Court of Justice, Advisory Opinion, March 30, 1950.

Advisory function.—Competence of the Court: objection on the ground of alleged lack of competence of the General Assembly, based on the character of the Court as an organ of the United Nations; Article 2, paragraph 7, of the Charter.—Power of the Court to reply to a Request for Opinion in spite of the opposition of certain States; duty to answer; limits of this duty; Article 65 of the Statute.—Questions relating solely to the conditions of application of a procedure, provided for by treaty, for the settlement of disputes.—Article 68 of the Statute: discretion allowed to the Court.—Existence of disputes; applicability of the procedure provided for by treaty for the settlement of disputes to disputes concerning the interpretation or execution of the treaty.—Definition of a question put to the Court.—Compulsory settlement of disputes by Treaty Commissions; obligation for the parties to the dispute to co-operate in the constitution of the Commissions by appointing their representatives.†

On October 22nd, 1949, the General Assembly of the United Nations adopted the following Resolution:

“Whereas the United Nations, pursuant to Article 55 of the Charter, shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Whereas the General Assembly, at the second part of its Third Regular Session, considered the question of the observance in Bulgaria and Hungary of human rights and fundamental freedoms,

Whereas the General Assembly, on 30 April 1949, adopted Resolution 272 (III) concerning this question in which it expressed its deep concern at the grave accusations made against the Governments of Bulgaria and Hungary regarding the suppression of human rights and fundamental freedoms in those countries; noted with satisfaction that steps had been taken by several States signatories to the Treaties of Peace with Bulgaria and Hungary regarding these accusations; expressed the hope that measures would be diligently applied, in accordance with the Treaties, in order to ensure respect for human

* Excerpted text of opinion.

† Caption by the Court.

rights and fundamental freedoms; and most urgently drew the attention of the Governments of Bulgaria and Hungary to their obligations under the Peace Treaties, including the obligation to co-operate in the settlement of the question,

Whereas the General Assembly has resolved to consider also at the Fourth Regular Session the question of the observance in Romania of human rights and fundamental freedoms,

Whereas certain of the Allied and Associated Powers signatories to the Treaties of Peace with Bulgaria, Hungary and Romania have charged the Governments of those countries with violations of the Treaties of Peace and have called upon those Governments to take remedial measures,

Whereas the Governments of Bulgaria, Hungary and Romania have rejected the charges of Treaty violations,

Whereas the Governments of the Allied and Associated Powers concerned have sought unsuccessfully to refer the question of Treaty violations to the Heads of Mission in Sofia, Budapest and Bucharest, in pursuance of certain provisions in the Treaties of Peace,

Whereas the Governments of these Allied and Associated Powers have called upon the Governments of Bulgaria, Hungary and Romania to join in appointing Commissions pursuant to the provisions of the respective Treaties of Peace for the settlement of disputes concerning the interpretation or execution of these Treaties,

Whereas the Governments of Bulgaria, Hungary and Romania have refused to appoint their representatives to the Treaty Commissions, maintaining that they were under no legal obligation to do so,

Whereas the Secretary-General of the United Nations is authorized by the Treaties of Peace, upon request by either party to a dispute, to appoint the third member of a Treaty Commission if the parties fail to agree upon the appointment of the third member,

Whereas it is important for the Secretary-General to be advised authoritatively concerning the scope of his authority under the Treaties of Peace,

The General Assembly

1. *Expresses* its continuing interest in and its increased concern at the grave accusations made against Bulgaria, Hungary and Romania;

2. *Records* its opinion that the refusal of the Governments of Bulgaria, Hungary and Romania to co-operate in its efforts to examine the grave charges with regard to the observance of human rights and fundamental freedoms justifies this concern of the General Assembly about the state of affairs prevailing in Bulgaria, Hungary and Romania in this respect;

3. *Decides* to submit the following questions to the International Court of Justice for an advisory opinion:

- 'I. Do the diplomatic exchanges between Bulgaria, Hungary and Romania, on the one hand, and certain Allied and Associated Powers signatories to the Treaties of Peace, on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the

settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria, Article 40 of the Treaty of Peace with Hungary, and Article 38 of the Treaty of Peace with Romania?

In the event of an affirmative reply to question I:

- 'II. Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the articles referred to in question I, including the provisions for the appointment of their representatives to the Treaty Commissions?'

In the event of an affirmative reply to question II and if within thirty days from the date when the Court delivers its opinion, the Governments concerned have not notified the Secretary-General that they have appointed their representatives to the Treaty Commissions, and the Secretary-General has so advised the International Court of Justice:

- 'III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties?'

In the event of an affirmative reply to question III:

- 'IV. Would a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations constitute a Commission, within the meaning of the relevant Treaty articles, competent to make a definitive and binding decision in settlement of a dispute?'

4. *Requests* the Secretary-General to make available to the International Court of Justice the relevant exchanges of diplomatic correspondence communicated to the Secretary-General for circulation to the Members of the United Nations and the records of the General Assembly proceedings on this question;

5. *Decides* to retain on the agenda of the Fifth Regular Session of the General Assembly the question of the observance of human rights and fundamental freedoms in Bulgaria, Hungary and Romania, with a view to ensuring that the charges are appropriately examined and dealt with."

.

In conformity with the Resolution of the General Assembly of October 22nd, 1949, the Court is at present called upon to give an Opinion only on Questions I and II set forth in that Resolution.

The power of the Court to exercise its advisory function in the present case has been contested by the Governments of Bulgaria, Hungary and

Romania, and also by several other Governments, in the communications which they have addressed to the Court.

This objection is founded mainly on two arguments.

It is contended that the Request for an Opinion was an action *ultra vires* on the part of the General Assembly because, in dealing with the question of the observance of human rights and fundamental freedoms in the three States mentioned above, it was "interfering" or "intervening" in matters essentially within the domestic jurisdiction of States. This contention against the exercise by the Court of its advisory function seems thus to be based on the alleged incompetence of the General Assembly itself, an incompetence deduced from Article 2, paragraph 7, of the Charter.

The terms of the General Assembly's Resolution of October 22nd, 1949, considered as a whole and in its separate parts, show that this argument is based on a misunderstanding. When the vote was taken on this Resolution, the General Assembly was faced with a situation arising out of the charges made by certain Allied and Associated Powers, against the Governments of Bulgaria, Hungary and Romania of having violated the provisions of the Peace Treaties concerning the observance of human rights and fundamental freedoms. For the purposes of the present Opinion, it suffices to note that the General Assembly justified the adoption of its Resolution by stating that "the United Nations, pursuant to Article 55 of the Charter, shall promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

The Court is not called upon to deal with the charges brought before the General Assembly since the Questions put to the Court relate neither to the alleged violations of the provisions of the Treaties concerning human rights and fundamental freedoms nor to the interpretation of the articles relating to these matters. The object of the Request is much more limited. It is directed solely to obtaining from the Court certain clarifications of a legal nature regarding the applicability of the procedure for the settlement of disputes by the Commissions provided for in the express terms of Article 36 of the Treaty with Bulgaria, Article 40 of the Treaty with Hungary and Article 38 of the Treaty with Romania. The interpretation of the terms of a treaty for this purpose could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of international law which, by its very nature, lies within the competence of the Court.

These considerations also suffice to dispose of the objection based on the principle of domestic jurisdiction and directed specifically against the competence of the Court, namely, that the Court, as an organ of the United Nations, is bound to observe the provisions of the Charter, including Article 2, paragraph 7.

The same considerations furnish an answer to the objection that the advisory procedure before the Court would take the place of the procedure instituted by the Peace Treaties for the settlement of disputes. So far from placing an obstacle in the way of the latter procedure, the object of this Request is to facilitate it by seeking information for the General Assembly as to its applicability to the circumstances of the present case.

It thus appears that these objections to the Court's competence to give the Advisory Opinion which has been requested are ill-founded and cannot be upheld.

Another argument that has been invoked against the power of the Court to answer the Questions put to it in this case is based on the opposition of the Governments of Bulgaria, Hungary and Rumania to the advisory procedure. The Court cannot, it is said, give the Advisory Opinion requested without violating the well-established principle of international law according to which no judicial proceedings relating to a legal question pending between States can take place without their consent.

This objection reveals a confusion between the principles governing contentious procedure and those which are applicable to Advisory Opinions.

The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations," represents its participation in the activities of the Organization, and, in principle, should not be refused.

There are certain limits, however, to the Court's duty to reply to a Request for an Opinion. It is not merely an "organ of the United Nations," it is essentially the "principal judicial organ" of the Organization (Art. 92 of the Charter and Art. 1 of the Statute). It is on account of this character of the Court that its power to answer the present Request for an Opinion has been challenged.

Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request. In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the *Eastern Carelia* case (Advisory Opinion No. 5), when that Court declined to give an Opinion because it found that the question put to it

was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties.

As has been observed, the present Request for an Opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that it in no way touches the merits of those disputes. Furthermore, the settlement of these disputes is entrusted solely to the Commissions provided for by the Peace Treaties. Consequently, it is for these Commissions to decide upon any objections which may be raised to their jurisdiction in respect of any of these disputes, and the present Opinion in no way prejudges the decisions that may be taken on those objections. It follows that the legal position of the parties to these disputes cannot be in any way compromised by the answers that the Court may give to the Questions put to it.

It is true that Article 68 of the Statute provides that the Court in the exercise of its advisory functions shall further be guided by the provisions of the Statute which apply in contentious cases. But according to the same article these provisions would be applicable only "to the extent to which it [the Court] recognizes them to be applicable." It is therefore clear that their application depends on the particular circumstances of each case and that the Court possesses a large amount of discretion in the matter. In the present case the Court is dealing with a Request for an Opinion, the sole object of which is to enlighten the General Assembly as to the opportunities which the procedure contained in the Peace Treaties may afford for putting an end to a situation which has been presented to it. That being the object of the Request, the Court finds in the opposition to it made by Bulgaria, Hungary and Romania no reason why it should abstain from replying to the Request.

For the reason stated above the Court considers that it has the power to answer Questions I and II and that it is under a duty to do so.

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The text of the articles mentioned in Question I is as follows:

Article 2 of the Treaty with Bulgaria (to which correspond *mutatis mutandis* Article 2, paragraph 1, of the Treaty with Hungary and Article 3, paragraph 1, of the Treaty with Romania):

"Bulgaria shall take all measures necessary to secure to all persons under Bulgarian jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and

publication, of religious worship, of political opinion and of public meeting."

Article 36 of the Treaty with Bulgaria (to which correspond *mutatis mutandis* Article 40 of the Treaty with Hungary and Article 38 of the Treaty with Romania):

"1. Except where another procedure is specifically provided under any article of the present Treaty, any dispute concerning the interpretation or execution of the Treaty, which is not settled by direct diplomatic negotiations, shall be referred to the Three Heads of Mission acting under Article 35, except that in this case the Heads of Mission will not be restricted by the time-limit provided in that Article. Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.

2. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding."

The text of Article 35, which is referred to in Article 36 of the Treaty with Bulgaria (and to which correspond *mutatis mutandis* Article 39 of the Treaty with Hungary and Article 37 of the Treaty with Romania), is as follows:

"1. For a period not to exceed eighteen months from the coming into force of the present Treaty, the Heads of the Diplomatic Missions in Sofia of the Soviet Union, the United Kingdom and the United States of America, acting in concert, will represent the Allied and Associated Powers in dealing with the Bulgarian Government in all matters concerning the execution and interpretation of the present Treaty.

2. The Three Heads of Mission will give the Bulgarian Government such guidance, technical advice and clarification as may be necessary to ensure the rapid and efficient execution of the present Treaty both in letter and in spirit.

3. The Bulgarian Government shall afford the said Three Heads of Mission all necessary information and any assistance which they may require in the fulfilment of the tasks devolving on them under the present Treaty."

Question I involves two main points. First, do the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand and certain Allied and Associated Powers signatories to the Peace Treaties on the

other, disclose any disputes? Second, if they do, are such disputes among those which are subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty with Bulgaria, Article 40 of the Treaty with Hungary, and Article 38 of the Treaty with Romania?

Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence. In the diplomatic correspondence submitted to the Court, the United Kingdom, acting in association with Australia, Canada and New Zealand, and the United States of America charged Bulgaria, Hungary and Romania with having violated, in various ways, the provisions of the articles dealing with human rights and fundamental freedoms in the Peace Treaties and called upon the three Governments to take remedial measures to carry out their obligations under the Treaties. The three Governments, on the other hand, denied the charges. There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen.

This conclusion is not invalidated by the text of Article 36 of the Treaty with Bulgaria (Article 40 of the Treaty with Hungary and Article 38 of the Treaty with Romania). This article, in referring to "any dispute," is couched in general terms. It does not justify limiting the idea of "the dispute" to a dispute between the United States of America, the United Kingdom and the Union of Soviet Socialist Republics acting in concert on the one hand, and Bulgaria (Hungary or Romania) on the other. In the present case, a dispute exists between each of the three States—Bulgaria, Hungary and Romania—and each of the Allied and Associated States which sent protests to them.

The next point to be dealt with is whether the disputes are subject to the provisions of the articles for the settlement of disputes contained in the Peace Treaties. The disputes must be considered to fall within those provisions if they relate to the interpretation or execution of the Treaties, and if no other procedure of settlement is specifically provided elsewhere in the Treaties.

Inasmuch as the disputes relate to the question of the performance or non-performance of the obligations provided in the articles dealing with human rights and fundamental freedoms, they are clearly disputes concerning the interpretation or execution of the Peace Treaties. In particular, certain answers from the Governments accused of violations of the Peace Treaties make use of arguments which clearly involve an interpretation of those Treaties.

Since no other procedure is specifically provided in any other article of the Treaties, the disputes must be subject to the methods of settlement contained in the articles providing for the settlement of all disputes.

The Court thus concludes that Question I must be answered in the affirmative.

In these circumstances, it becomes necessary to take up Question II, which is as follows:

“Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the articles referred to in Question I, including the provisions for the appointment of their representatives to the Treaty Commissions?”

Before answering the Question, the Court must determine the scope of the expression “the provisions of the articles referred to in Question I.” Question I mentions two sets of articles: one set being those articles concerning human rights, namely, Article 2 of the Treaties with Bulgaria and Hungary, and Article 3 of the Treaty with Romania; the other set being those articles concerning the settlement of disputes, namely, Article 36 of the Treaty with Bulgaria, Article 40 of the Treaty with Hungary and Article 38 of the Treaty with Romania. The Court considers that the expression “the provisions of the articles referred to in Question I” refers only to the articles providing for the settlement of disputes, and does not refer to the articles dealing with human rights.

This view is clearly borne out by the various considerations stated in the Resolution of the General Assembly of October 22nd, 1949. It is confirmed by the fact that the Questions put to the Court have for their sole object to determine whether the disputes, if they exist, are among those falling under the procedure provided for in the Treaties with a view to their settlement by arbitration. The Court does not think that the General Assembly would have asked it whether Bulgaria, Hungary and Romania are obligated to carry out the articles concerning human rights. For, in the first place, the three Governments have not denied that they are obligated to carry out these articles. In the second place, the words which precede Question II, “In the event of an affirmative answer to Question I,” exclude the idea that Question II refers to the articles relating to human rights. There is no reason why the General Assembly should have made the consideration of the question concerning human rights depend on an affirmative answer to a question relating to the existence of disputes. The articles concerning human rights are mentioned in Question I only by way of describing the subject-matter of the diplomatic exchanges between the States concerned.

The real meaning of Question II, in the opinion of the Court, is this: In view of the disputes which have arisen and which have so far not been settled, are Bulgaria, Hungary and Romania obligated to carry out, respectively, the provisions of Article 36 of the Treaty with Bulgaria, Article 40 of the Treaty with Hungary, and Article 38 of the Treaty with Romania?

The articles for the settlement of disputes provide that any dispute which is not settled by direct diplomatic negotiations shall be referred to the Three Heads of Mission. If not resolved by them within a period of two months, the dispute shall, unless the parties to the dispute agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member, to be selected in accordance with the relevant articles of the Treaties.

The diplomatic documents presented to the Court show that the United Kingdom and the United States of America on the one hand, and Bulgaria, Hungary and Romania on the other, have not succeeded in settling their disputes by direct negotiations. They further show that these disputes were not resolved by the Heads of Mission within the prescribed period of two months. It is a fact that the parties to the disputes have not agreed upon any other means of settlement. It is also a fact that the United Kingdom and the United States of America, after the expiry of the prescribed period, requested that the disputes should be settled by the Commissions mentioned in the Treaties.

This situation led the General Assembly to put Question II so as to obtain guidance for its future action.

The Court finds that all the conditions required for the commencement of the stage of the settlement of disputes by the Commissions have been fulfilled.

In view of the fact that the Treaties provide that any dispute shall be referred to a Commission "at the request of either party," it follows that either party is obligated, at the request of the other party, to co-operate in constituting the Commission, in particular by appointing its representative. Otherwise the method of settlement by Commissions provided for in the Treaties would completely fail in its purpose.

The reply to Question II, as interpreted above, must therefore be in the affirmative.

For these reasons,
THE COURT IS OF OPINION,

On Question I:

by eleven¹ votes to three,²

that the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand and certain Allied and Associated Powers signatories to

¹ Pres. Basdevant, Vice Pres. Guerrero, Judges Alvarez, Hackworth, DeVisscher, McNair, Klaestad, Badawi Pasha, Read, Hsu Mo, and Azevedo (the last delivering a separate concurring opinion).

² Judges Winiarski, Zori, and Krylov, who gave dissenting opinions.

the Treaties of Peace on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria, Article 40 of the Treaty of Peace with Hungary, and Article 38 of the Treaty of Peace with Romania;

On Question II:

by eleven votes¹ to three,²

that the Governments of Bulgaria, Hungary and Romania are obligated to carry out the provisions of those articles referred to in Question I, which relate to the settlement of disputes, including the provisions for the appointment of their representatives to the Treaty Commissions.

INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY, AND ROMANIA (SECOND PHASE). I. C. J. Reports, 1950, p. 221.*

International Court of Justice, Advisory Opinion, July 18, 1950.

Interpretation of article of a treaty referring the settlement of disputes to a commission composed of one representative from each party and a third member chosen by a common agreement between the two parties; power conferred upon the Secretary-General of the United Nations to proceed to the appointment of a third member, failing agreement between the parties.—Inapplicability of this provision to the case in which one of the parties refuses to appoint its own commissioner.—Natural and ordinary meaning of the terms; meaning which accords with the normal order of the appointment of commissioner—provision to be strictly construed.—Breach of a treaty obligation; impossibility of providing a remedy by modifying the conditions for the exercise of the power to appoint the third member as laid down in the Treaties.—Impossibility to apply the principle of interpretation ut res magis valeat quam pereat contrary to the letter and spirit of the Treaties.†

Having stated, in its Opinion of March 30th, 1950,³ that the Governments of Bulgaria, Hungary and Romania are obligated to carry out the provisions of those articles of the Peace Treaties which relate to the settlement of disputes, including the provisions for the appointment of their representatives to the Treaty Commissions, and having received information from the Secretary-General of the United Nations that none of those Governments had notified him, within thirty days from the date of the delivery of the Court's Advisory Opinion, of the appointment of its rep-

* Excerpted text of opinion.

† Caption by the Court.

¹ Pres. Basdevant, Vice Pres. Guerrero, Judges Alvarez, Hackworth, DeVisscher, McNair, Klaestad, Badawi Pasha, Read, Hsu Mo, and Azevedo (the last delivering a separate concurring opinion).

² Judges Winarski, Zoričić, and Krylov, who gave dissenting opinions.

³ *Supra*, p. 742.

representative to the Treaty Commissions, the Court is now called upon to answer Question III in the Resolution of the General Assembly of October 22nd, 1949, which reads as follows:

“III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties?”

Articles 36, 40 and 38, respectively, of the Peace Treaties with Bulgaria, Hungary and Romania, after providing that disputes concerning the interpretation or execution of the Treaties which had not been settled by direct negotiation should be referred to the Three Heads of Mission, continue:

“Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.

2. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding.”

The question at issue is whether the provision empowering the Secretary-General to appoint the third member of the Commission applies to the present case, in which one of the parties refuses to appoint its own representative to the Commission.

It has been contended that the term “third member” is used here simply to distinguish the neutral member from the two Commissioners appointed by the parties without implying that the third member can be appointed only when the two national Commissioners have already been appointed, and that therefore the mere fact of the failure of the parties, within the stipulated period, to select the third member by mutual agreement satisfies the condition required for the appointment of the latter by the Secretary-General.

The Court considers that the text of the Treaties does not admit of this interpretation. While the text in its literal sense does not completely exclude the possibility of the appointment of the third member before the appointment of both national Commissioners, it is nevertheless true that according to the natural and ordinary meaning of the terms it was intended that the appointment of both the national Commissioners should

precede that of the third member. This clearly results from the sequence of the events contemplated by the article: appointment of a national Commissioner by each party; selection of a third member by mutual agreement of the parties; failing such agreement within a month, his appointment by the Secretary-General. Moreover, this is the normal order followed in the practice of arbitration, and in the absence of any express provision to the contrary there is no reason to suppose that the parties wished to depart from it.

The Secretary-General's power to appoint a third member is derived solely from the agreement of the parties as expressed in the disputes clause of the Treaties; by its very nature such a clause must be strictly construed and can be applied only in the case expressly provided for therein. The case envisaged in the Treaties is exclusively that of the failure of the parties to agree upon the selection of a third member and by no means the much more serious case of a complete refusal of co-operation by one of them, taking the form of refusing to appoint its own Commissioner. The power conferred upon the Secretary-General to help the parties out of the difficulty of agreeing upon a third member cannot be extended to the situation which now exists.

Reference has been made for the purpose of justifying the reversal of the normal order of appointment, to the possible advantage that might result, in certain circumstances, from the appointment of a third member before the appointment by the parties of their respective commissioners. Such a change in the normal sequence could only be justified if it were shown by the attitude of the parties that they desired such a reversal in order to facilitate the constitution of the Commissions in accordance with the terms of the Treaties. But such is not the present case. The Governments of Bulgaria, Hungary and Romania have from the beginning denied the very existence of a dispute, and have absolutely refused to take part, in any manner whatever, in the procedure provided for in the disputes clauses of the Treaties. Even after the Court had given its Advisory Opinion of March 30th, 1950, which declared that these three Governments were bound to carry out the provisions of the Peace Treaties for the settlement of disputes, particularly the obligation to appoint their own Commissioners, these Governments have continued to adopt a purely negative attitude.

In these circumstances, the appointment of a third member by the Secretary-General, instead of bringing about the constitution of a three-member Commission such as the Treaties provide for, would result only in the constitution of a two-member Commission. A Commission consisting of two members is not the kind of commission for which the Treaties have provided. The opposition of the Commissioner of the only party represented could prevent a Commission so constituted from reaching any decision whatever. Such a Commission could only decide by unanimity,

whereas the dispute clause provides that "the decision of the majority of the members of the Commission shall be the decision of the Commission and shall be accepted by the parties as definitive and binding." Nor would the decisions of a Commission of two members, one of whom is appointed by one party only, have the same degree of moral authority as those of a three-member Commission. In every respect, the result would be contrary to the letter as well as the spirit of the Treaties.

In short, the Secretary-General would be authorized to proceed to the appointment of a third member only if it were possible to constitute a Commission in conformity with the provisions of the Treaties. In the present case, the refusal by the Governments of Bulgaria, Hungary and Romania to appoint their own Commissioners has made the constitution of such a Commission impossible and has deprived the appointment of the third member by the Secretary-General of every purpose.

As the Court has declared in its Opinion of March 30th, 1950, the Governments of Bulgaria, Hungary and Romania are under an obligation to appoint their representatives to the Treaty Commissions, and it is clear that refusal to fulfil a treaty obligation involves international responsibility. Nevertheless, such a refusal cannot alter the conditions contemplated in the Treaties for the exercise by the Secretary-General of his power of appointment. These conditions are not present in this case, and their absence is not made good by the fact that it is due to the breach of a treaty obligation. The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them.

The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit.

It has been pointed out that an arbitration commission may make a valid decision although the original number of its members, as fixed by the arbitration agreement, is later reduced by such circumstances as the withdrawal of one of the commissioners. These cases presuppose the initial validity of a commission, constituted in conformity with the will of the parties as expressed in the arbitration agreement, whereas the appointment of the third member by the Secretary-General in circumstances other than those contemplated in the Treaties raises precisely the question of the initial validity of the constitution of the Commission. In law, the two situations are clearly distinct and it is impossible to argue from one to the other.

Finally, it has been alleged that a negative answer by the Court to Question III would seriously jeopardize the future of the large number of arbitration clauses which have been drafted on the same model as that which appears in the Peace Treaties with Bulgaria, Hungary and Rumania. The ineffectiveness in the present case of the clauses dealing with the settlement of disputes does not permit such a generalization. An examination of the practice of arbitration shows that, whereas the draftsmen of arbitration conventions have very often taken care to provide for the consequences of the inability of the parties to agree on the appointment of a third member, they have, apart from exceptional cases, refrained from anticipating a refusal by a party to appoint its own commissioner. The few Treaties containing express provisions for such a refusal indicate that the States which adopted this course felt the impossibility of remedying this situation simply by way of interpretation. In fact, the risk of such a possibility of a refusal is a small one, because normally each party has a direct interest in the appointment of its commissioner and must in any case be presumed to observe its treaty obligations. That this was not so in the present case does not justify the Court in exceeding its judicial function on the pretext of remedying a default for the occurrence of which the Treaties have made no provision.

Consequently, Question III must be answered in the negative. It is therefore not necessary for the Court to consider Question IV, which requires an answer only in the event of an affirmative answer to the preceding Question.

For these reasons,

THE COURT IS OF OPINION,

by eleven ¹ votes to two,²

that, if one party fails to appoint a representative to a Treaty Commission under the Peace Treaties with Bulgaria, Hungary and Rumania where that party is obligated to appoint a representative to the Treaty Commission, the Secretary-General of the United Nations is not authorized to appoint the third member of the Commission upon the request of the other party to a dispute.

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Judge KRYLOV, while joining in the conclusions of the opinion and the general line of argument, declares that he is unable to concur in the reasons dealing with the problem of international responsibility which, in his opinion, goes beyond the scope of the request for opinion.

¹ Pres. Basdevant, Vice Pres. Guerrero, Judges Alvarez, Hackworth, Winiarski, De Visscher, McNair, Klaestad, Badawi Pasha, Krylov, Hsu Mo.

² Judges Read and Azevedo.

Judges READ and AZEVEDO, declaring that they are unable to concur in the Opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Opinion statements of their dissenting opinion.³

INTERNATIONAL STATUS OF SOUTH-WEST AFRICA. I. C. J. Reports, 1950, p. 128.*

International Court of Justice, Advisory Opinion, July 11, 1950.

Continued existence of the Mandate for South-West Africa conferred upon the Union of South Africa, and of the international obligations derived therefrom.—Article 22 of the Covenant of the League of Nations.—Article 80, paragraph 1, of the Charter.—International Mandates distinguished from the notions of mandate in national law.—Declarations by Union Government as to the continuance of its obligations under the Mandate.—Obligation of Union Government to accept supervision by the United Nations and to submit reports and petitions.—Competence of the General Assembly of the United Nations derived from Article 10 of the Charter.—Compulsory jurisdiction of the International Court of Justice.

Applicability of Chapter XII of the Charter.—Optional or compulsory nature of the placing of the Territory of South-West Africa under the Trusteeship System.—Articles 75, 77, 79 and 80, paragraph 2, of the Charter.

Competence to modify the international status of the Territory of South-West Africa.†

On December 6th, 1949, the General Assembly of the United Nations adopted the following resolution:

“The General Assembly,

Recalling its previous resolutions 65 (I) of 14 December 1946, 141 (II) of 1 November 1947 and 227 (III) of 26 November 1948 concerning the Territory of South-West Africa,

Considering that it is desirable that the General Assembly for its further consideration of the question, should obtain an advisory opinion on its legal aspects,

1. Decides to submit the following questions to the International Court of Justice with a request for an advisory opinion which shall be transmitted to the General Assembly before its fifth regular session, if possible:

‘What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular:

* Not printed here.

* Excerpted text of opinion.

† Caption by the Court.

(a) Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations?

(b) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South-West Africa?

(c) Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?

2. *Requests* the Secretary-General to transmit the present resolution to the International Court of Justice, in accordance with Article 65 of the Statute of the Court, accompanied by all documents likely to throw light upon the question.

The Secretary-General shall include among these documents the text of Article 22 of the Covenant of the League of Nations; the text of the Mandate for German South-West Africa, confirmed by the Council of the League on 17 December 1920; relevant documentation concerning the objectives and the functions of the Mandates System; the text of the resolution adopted by the League of Nations on the question of Mandates on 18 April 1946; the text of Articles 77 and 80 of the Charter and data on the discussion of these articles in the San Francisco Conference and the General Assembly; the report of the Fourth Committee and the official records, including the annexes, of the consideration of the question of South-West Africa at the fourth session of the General Assembly."

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The request for an opinion begins with a general question as follows:

"What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South Africa arising therefrom?"

The Court is of opinion that an examination of the three particular questions submitted to it will furnish a sufficient answer to this general question and that it is not necessary to consider the general question separately. It will therefore begin at once with an examination of the particular questions.

Question (a): *"Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations?"*

The Territory of South-West Africa was one of the German overseas possessions in respect of which Germany, by Article 119 of the Treaty of Versailles, renounced all her rights and titles in favour of the Principal Allied and Associated Powers. When a decision was to be taken with regard to the future of these possessions as well as of other territories which, as a consequence of the war of 1914-1918, had ceased to be under the sovereignty of the States which formerly governed them, and which

were inhabited by peoples not yet able to assume a full measure of self-government, two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form "a sacred trust of civilization."

With a view to giving practical effect to these principles, an international régime, the Mandates System, was created by Article 22 of the Covenant of the League of Nations. A "tutelage" was to be established for these peoples, and this tutelage was to be entrusted to certain advanced nations and exercised by them "as mandatories on behalf of the League."

Accordingly, the Principal Allied and Associated Powers agreed that a Mandate for the Territory of South-West Africa should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa and proposed the terms of this Mandate. His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, agreed to accept the Mandate and undertook to exercise it on behalf of the League of Nations in accordance with the proposed terms. On December 17th, 1920, the Council of the League of Nations, confirming the Mandate, defined its terms.

In accordance with these terms, the Union of South Africa (the "Mandatory") was to have full power of administration and legislation over the Territory as an integral portion of the Union and could apply the laws of the Union to the Territory subject to such local modifications as circumstances might require. On the other hand, the Mandatory was to observe a number of obligations, and the Council of the League was to supervise the administration and see to it that these obligations were fulfilled.

The terms of this Mandate, as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that the creation of this new international institution did not involve any cession of territory or transfer of sovereignty to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants.

It is now contended on behalf of the Union Government that this Mandate has lapsed, because the League has ceased to exist. This contention is based on a misconception of the legal situation created by Article 22 of the Covenant and by the Mandate itself. The League was not, as alleged by that Government, a "mandator" in the sense in which this term is used in the national law of certain States. It had only assumed an international function of supervision and control. The "Mandate" had only the name in common with the several notions of mandate in national law. The object of the Mandate regulated by international rules far exceeded that of contractual relations regulated by national law. The Man-

date was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization. It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law. The international rules regulating the Mandate constituted an international status for the Territory recognized by all the Members of the League of Nations, including the Union of South Africa.

The essentially international character of the functions which had been entrusted to the Union of South Africa appears particularly from the fact that by Article 22 of the Covenant and Article 6 of the Mandate the exercise of these functions was subjected to the supervision of the Council of the League of Nations and to the obligation to present annual reports to it; it also appears from the fact that any Member of the League of Nations could, according to Article 7 of the Mandate, submit to the Permanent Court of International Justice any dispute with the Union Government relating to the interpretation or the application of the provisions of the Mandate.

The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified.

These international obligations, assumed by the Union of South Africa, were of two kinds. One kind was directly related to the administration of the Territory, and corresponded to the sacred trust of civilization referred to in Article 22 of the Covenant. The other related to the machinery for implementation, and was closely linked to the supervision and control of the League. It corresponded to the "securities for the performance of this trust" referred to in the same article.

The first-mentioned group of obligations are defined in Article 22 of the Covenant and in Articles 2 to 5 of the Mandate. The Union undertook the general obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants. It assumed particular obligations relating to slave trade, forced labour, traffic in arms and ammunition, intoxicating spirits and beverages, military training and establishments, as well as obligations relating to freedom of conscience and free exercise of worship, including special obligations with regard to missionaries.

These obligations represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ

ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon.

This view is confirmed by Article 80, paragraph 1, of the Charter, which maintains the rights of States and peoples and the terms of existing international instruments until the territories in question are placed under the Trusteeship System. It is true that this provision only says that nothing in Chapter XII shall be construed to alter the rights of States or peoples or the terms of existing international instruments. But—as far as mandated territories are concerned, to which paragraph 2 of this article refers—this provision presupposes that the rights of States and peoples shall not lapse automatically on the dissolution of the League of Nations. It obviously was the intention to safeguard the rights of States and peoples under all circumstances and in all respects, until each territory should be placed under the Trusteeship System.

This view results, moreover, from the Resolution of the League of Nations of April 18th, 1946, which said:

“Recalling that Article 22 of the Covenant applies to certain territories placed under Mandate the principle that the well-being and development of peoples not yet able to stand alone in the strenuous conditions of the modern world form a sacred trust of civilization:

.....

3. Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;

4. Takes note of the expressed intentions of the Members of the League now administering territories under Mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers.”

As will be seen from this resolution, the Assembly said that the League's functions with respect to mandated territories would come to an end; it did not say that the Mandates themselves came to an end. In confining itself to this statement, and in taking note, on the other hand, of the expressed intentions of the mandatory Powers to continue to administer the mandated territories in accordance with their respective Mandates, until other arrangements had been agreed upon between the United Nations and those Powers, the Assembly manifested its understanding that the Mandates were to continue in existence until “other arrangements” were established.

A similar view has on various occasions been expressed by the Union of South Africa. In declarations made to the League of Nations, as well as to the United Nations, the Union Government has acknowledged that its

obligations under the Mandate continued after the disappearance of the League. In a declaration made on April 9th, 1946, in the Assembly of the League of Nations, the representative of the Union Government, after having declared his Government's intention to seek international recognition for the Territory of South-West Africa as an integral part of the Union, stated: "In the meantime, the Union will continue to administer the Territory scrupulously in accordance with the obligations of the Mandate for the advancement and promotion of the interests of the inhabitants as she has done during the past six years when meetings of the Mandates Commission could not be held." After having said that the disappearance of the Mandates Commission and of the League Council would "necessarily preclude complete compliance with the letter of the Mandate," he added: "The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the Territory."

In a memorandum submitted on October 17th, 1946, by the South-African Legation in Washington to the Secretary-General of the United Nations, expression was given to a similar view. Though the League had at that time disappeared, the Union Government continued to refer to its responsibility under the Mandate. It stated: "This responsibility of the Union Government as Mandatory is necessarily inalienable." On November 4th, 1946, the Prime Minister of the Union, in a statement to the Fourth Committee of the United Nations General Assembly, repeated the declaration which the representative of the Union had made previously to the League of Nations.

In a letter of July 23rd, 1947, to the Secretary-General of the United Nations, the Legation of the Union referred to a resolution of the Union Parliament in which it was declared "that the Government should continue to render reports to the United Nations Organization as it has done heretofore under the Mandate." It was further stated in that letter: "In the circumstances the Union Government have no alternative but to maintain the *status quo* and to continue to administer the Territory in the spirit of the existing Mandate."

These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court.

The Court will now consider the above-mentioned second group of obligations. These obligations related to the machinery for implementation and were closely linked to the supervisory functions of the League of Nations—particularly the obligation of the Union of South Africa to submit to the supervision and control of the Council of the League and the obligation to render to it annual reports in accordance with Article 22 of the Covenant and Article 6 of the Mandate. Since the Council disappeared by the dissolution of the League, the question arises whether these supervisory functions are to be exercised by the new international organization created by the Charter, and whether the Union of South Africa is under an obligation to submit to a supervision by this new organ and to render annual reports to it.

Some doubts might arise from the fact that the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship System were neither expressly transferred to the United Nations nor expressly assumed by that organization. Nevertheless, there seem to be decisive reasons for an affirmative answer to the above-mentioned question.

The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision. The authors of the Charter had in mind the same necessity when they organized an International Trusteeship System. The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System. It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions.

These general considerations are confirmed by Article 80, paragraph 1, of the Charter, as this clause has been interpreted above. It purports to safeguard, not only the rights of States, but also the rights of the peoples of mandated territories until Trusteeship Agreements are concluded. The purpose must have been to provide a real protection for those rights; but no such rights of the peoples could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ.

The Assembly of the League of Nations, in its Resolution of April 18th, 1946, gave expression to a corresponding view. It recognized, as mentioned above, that the League's functions with regard to the mandated territories would come to an end, but noted that Chapters XI, XII and XIII of the Charter of the United Nations embody principles correspond-

ing to those declared in Article 22 of the Covenant. It further took note of the intentions of the mandatory States to continue to administer the territories in accordance with the obligations contained in the Mandates until other arrangements should be agreed upon between the United Nations and the mandatory Powers. This resolution presupposes that the supervisory functions exercised by the League would be taken over by the United Nations.

The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations. This competence was in fact exercised by the General Assembly in Resolution 141 (II) of November 1st, 1947, and in Resolution 227 (III) of November 26th, 1948, confirmed by Resolution 337 (IV) of December 6th, 1949.

For the above reasons, the Court has arrived at the conclusion that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it.

The right of petition was not mentioned by Article 22 of the Covenant or by the provisions of the Mandate. But on January 31st, 1923, the Council of the League of Nations adopted certain rules relating to this matter. Petitions to the League from communities or sections of the populations of mandated territories were to be transmitted by the mandatory Governments, which were to attach to these petitions such comments as they might consider desirable. By this innovation the supervisory function of the Council was rendered more effective.

The Court is of opinion that this right, which the inhabitants of South-West Africa had thus acquired, is maintained by Article 80, paragraph 1, of the Charter, as this clause has been interpreted above. In view of the result at which the Court has arrived with respect to the exercise of the supervisory functions by the United Nations and the obligation of the Union Government to submit to such supervision, and having regard to the fact that the dispatch and examination of petitions form a part of that supervision, the Court is of the opinion that petitions are to be transmitted by that Government to the General Assembly of the United Nations, which is legally qualified to deal with them.

It follows from what is said above that South-West Africa is still to be considered as a territory held under the Mandate of December 17th, 1920. The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and

should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations. These observations are particularly applicable to annual reports and petitions.

According to Article 7 of the Mandate, disputes between the mandatory State and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, if not settled by negotiation, should be submitted to the Permanent Court of International Justice. Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of opinion that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions.

Reference to Chapter XI of the Charter was made by various Governments in written and oral statements presented to the Court. Having regard to the results at which the Court has arrived, the question whether the provisions of that chapter are applicable does not arise for the purpose of the present Opinion. It is not included in the questions submitted to the Court and it is unnecessary to consider it.

Question (b): *“Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner to the Territory of South-West Africa?”*

Territories held under Mandate were not by the Charter automatically placed under the new International Trusteeship System. This system should, according to Articles 75 and 77, apply to territories which are placed thereunder by means of Trusteeship Agreements. South-West Africa, being a territory held under Mandate (Article 77 a) may be placed under the Trusteeship System in accordance with the provisions of Chapter XII. In this sense, that chapter is applicable to the Territory.

Question (b) further asks in what manner Chapter XII is applicable to the Territory. It appears from a number of documents submitted to the Court in accordance with the General Assembly's Resolution of December 6th, 1949, as well as from the written and the oral observations of several Governments, that the General Assembly, in asking about the manner of application of Chapter XII, was referring to the question whether the Charter imposes upon the Union of South Africa an obligation to place the Territory under the Trusteeship System by means of a Trusteeship Agreement.

Articles 75 and 77 show, in the opinion of the Court, that this question must be answered in the negative. The language used in both articles is permissive (“as may be placed thereunder”). Both refer to subsequent agreements by which the territories in question may be placed under the Trusteeship System. An “agreement” implies consent of the parties concerned, including the mandatory Power in the case of territories held

under Mandate (Article 79). The parties must be free to accept or reject the terms of a contemplated agreement. No party can impose its terms on the other party. Article 77, paragraph 2, moreover, presupposes agreement not only with regard to its particular terms, but also as to which territories will be brought under the Trusteeship System.

It has been contended that the word "voluntarily," used in Article 77 with respect to category (c) only, shows that the placing of other territories under Trusteeship is compulsory. This word alone cannot, however, over-ride the principle derived from Articles 75, 77 and 79 considered as a whole. An obligation for a mandatory State to place the Territory under Trusteeship would have been expressed in a direct manner. The word "voluntarily" incorporated in category (c) can be explained as having been used out of an abundance of caution and as an added assurance of freedom of initiative to States having territories falling within that category.

It has also been contended that paragraph 2 of Article 80 imposes on mandatory States a duty to negotiate and conclude Trusteeship Agreements. The Court finds no justification for this contention. The paragraph merely states that the first paragraph of the article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the Trusteeship System as provided for in Article 77. There is nothing to suggest that the provision was intended as an exception to the principle derived from Articles 75, 77 and 79. The provision is entirely negative in character and cannot be said to create an obligation to negotiate and conclude an agreement. Had the parties to the Charter intended to create an obligation of this kind for a mandatory State, such intention would necessarily have been expressed in positive terms.

It has further been maintained that Article 80, paragraph 2, creates an obligation for mandatory States to enter into negotiations with a view to concluding a Trusteeship Agreement. But an obligation to negotiate without any obligation to conclude an agreement can hardly be derived from this provision, which expressly refers to delay or postponement of "the negotiation and conclusion" of agreements. It is not limited to negotiations only. Moreover, it refers to the negotiation and conclusion of agreements for placing "mandated and other territories under the Trusteeship System as provided for in Article 77." In other words, it refers not merely to territories held under Mandate, but also to the territories mentioned in Article 77 (b) and (c). It is, however, evident that there can be no obligation to enter into negotiations with a view to concluding Trusteeship Agreements for those territories.

It is contended that the Trusteeship System created by the Charter would have no more than a theoretical existence if the mandatory Powers were not under an obligation to enter into negotiations with a view to conclud-

ing Trusteeship Agreements. This contention is not convincing, since an obligation merely to negotiate does not of itself assure the conclusion of Trusteeship Agreements. Nor was the Trusteeship System created only for mandated territories.

It is true that, while Members of the League of Nations regarded the Mandates System as the best method for discharging the sacred trust of civilization provided for in Article 22 of the Covenant, the Members of the United Nations considered the International Trusteeship System to be the best method for discharging a similar mission. It is equally true that the Charter has contemplated and regulated only a single system, the International Trusteeship System. It did not contemplate or regulate a co-existing Mandates System. It may thus be concluded that it was expected that the mandatory States would follow the normal course indicated by the Charter, namely, conclude Trusteeship Agreements. The Court is, however, unable to deduce from these general considerations any legal obligation for mandatory States to conclude or to negotiate such agreements. It is not for the Court to pronounce on the political or moral duties which these considerations may involve.

For these reasons, the Court considers that the Charter does not impose on the Union an obligation to place South-West Africa under the Trusteeship System.

Question (c): *“Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?”*

The international status of the Territory results from the international rules regulating the rights, powers and obligations relating to the administration of the Territory and the supervision of that administration, as embodied in Article 22 of the Covenant and in the Mandate. It is clear that the Union has no competence to modify unilaterally the international status of the Territory or any of these international rules. This is shown by Article 7 of the Mandate, which expressly provides that the consent of the Council of the League of Nations is required for any modification of the terms of the Mandate.

The Court is further requested to say where competence to determine and modify the international status of the Territory rests.

Before answering this question, the Court repeats that the normal way of modifying the international status of the Territory would be to place it under the Trusteeship System by means of a Trusteeship Agreement in accordance with the provisions of Chapter XII of the Charter.

The competence to modify in other ways the international status of the

Territory depended on the rules governing the amendment of Article 22 of the Covenant and the modification of the terms of the Mandate.

Article 26 of the Covenant laid down the procedure for amending provisions of the Covenant, including Article 22. On the other hand, Article 7 of the Mandate stipulates that the consent of the Council of the League was required for any modification of the terms of that Mandate. The rules thus laid down have become inapplicable following the dissolution of the League of Nations. But one cannot conclude therefrom that no proper procedure exists for modifying the international status of South-West Africa.

Article 7 of the Mandate, in requiring the consent of the Council of the League of Nations for any modification of its terms, brought into operation for this purpose the same organ which was invested with powers of supervision in respect of the administration of the Mandates. In accordance with the reply given above to Question (a), those powers of supervision now belong to the General Assembly of the United Nations. On the other hand, Articles 79 and 85 of the Charter require that a Trusteeship Agreement be concluded by the mandatory Power and approved by the General Assembly before the International Trusteeship System may be substituted for the Mandates System. These articles also give the General Assembly authority to approve alterations or amendments of Trusteeship Agreements. By analogy, it can be inferred that the same procedure is applicable to any modification of the international status of a territory under Mandate which would not have for its purpose the placing of the territory under the Trusteeship System. This conclusion is strengthened by the action taken by the General Assembly and the attitude adopted by the Union of South Africa which is at present the only existing mandatory Power.

On January 22nd, 1946, before the Fourth Committee of the General Assembly, the representative of the Union of South Africa explained the special relationship between the Union and the Territory under its Mandate. There would—he said—be no attempt to draw up an agreement until the freely expressed will of both the European and native populations had been ascertained. He continued: "When that had been done, the decision of the Union would be submitted to the General Assembly for judgment."

On April 9th, 1946, before the Assembly of the League of Nations, the Union representative declared that "it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according South-West Africa a status under which it would be internationally recognized as an integral part of the Union."

In accordance with these declarations, the Union Government, by letter of August 12th, 1946, from its Legation in Washington, requested that the

question of the desirability of the territorial integration in, and the annexation to, the Union of South Africa of the mandated Territory of South-West Africa, be included in the Agenda of the General Assembly. In a subsequent letter of October 9th, 1946, it was requested that the text of the item to be included in the Agenda be amended as follows: "Statement by the Government of the Union of South Africa on the outcome of their consultations with the peoples of South-West Africa as to the future status of the mandated Territory, and implementation to be given to the wishes thus expressed."

On November 4th, 1946, before the Fourth Committee, the Prime Minister of the Union of South Africa stated that the Union clearly understood "that its international responsibility precluded it from taking advantage of the war situation by effecting a change in the status of South-West Africa without proper consultation either of all the peoples of the Territory itself, or with the competent international organs."

By thus submitting the question of the future international status of the Territory to the "judgment" of the General Assembly as the "competent international organ," the Union Government recognized the competence of the General Assembly in the matter.

The General Assembly, on the other hand, affirmed its competence by Resolution 65 (I) of December 14th, 1946. It noted with satisfaction that the step taken by the Union showed the recognition of the interest and concern of the United Nations in the matter. It expressed the desire "that agreement between the United Nations and the Union of South Africa may hereafter be reached regarding the future status of the Mandated Territory of South-West Africa," and concluded: "The General Assembly, therefore, is unable to accede to the incorporation of the Territory of South-West Africa in the Union of South Africa."

Following the adoption of this resolution, the Union Government decided not to proceed with the incorporation of the Territory, but to maintain the *status quo*. The General Assembly took note of this decision in its Resolution 141 (II) of November 1st, 1947.

On the basis of these considerations, the Court concludes that competence to determine and modify the international status of South-West Africa rests with the Union of South Africa acting with the consent of the United Nations.

For these reasons,

THE COURT IS OF OPINION,

On the General Question:

unanimously,

that South-West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17th, 1920;

On Question (a):

by twelve votes to two,¹

that the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court;

On Question (b):

unanimously,

that the provisions of Chapter XII of the Charter are applicable to the Territory of South-West Africa in the sense that they provide a means by which the Territory may be brought under the Trusteeship System;

and by eight votes to six,²

that the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to place the Territory under the Trusteeship System;

On Question (c):

unanimously,

that the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa, and that the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations.

Sea bed and subsoil off Texas—Federal control resulting from annexation terms

UNITED STATES v. STATE OF TEXAS. 339 U. S. 707.

United States Supreme Court, June 5, 1950. Douglas, J.

The United States brought an original action against Texas, alleging that it was and is the "owner in fee simple of, or possessed of paramount rights in, and full dominion and power over," the land and minerals

¹ Judges McNair and Read wrote separate opinions concurring on the remaining points but dissenting from the portion relating to the exercise of supervisory functions by, and making of reports to, the United Nations.

² Judges Alvarez, DeVisscher, Krylov, Zoričić, Badawi Pasha, and Vice Pres. Guerrero. The first three wrote dissenting opinions, and the others declared their inability to

underlying the Gulf of Mexico off Texas seaward of low-water mark and outside inland waters. It asked for a decree declaring these rights of the United States, enjoining Texas and those claiming under it from trespassing on the area, and requiring Texas to account for all money derived by it from the area after June 23, 1947. Texas answered, *inter alia*, that as an independent nation the Republic of Texas had full jurisdiction and control over the land and minerals within three leagues of its shores, that this claim had been recognized by the United States, and that at the time of annexation of Texas there was an agreement that Texas would not cede such lands or minerals to the United States but retain them with its other public lands. The United States' motion for judgment on the pleadings because of the insufficiency of the Texas defenses was granted.¹ Relying strongly on *United States v. California*, 332 U. S. 19, this JOURNAL, Vol. 42 (1948), p. 209, the Court said in part:

The sum of the argument is that prior to annexation Texas had both *dominium* (ownership or proprietary rights) and *imperium* (governmental powers of regulation and control) as respects the lands, minerals and other products underlying the marginal sea. In the case of California we found that she, like the original thirteen colonies, never had *dominium* over that area. The first claim to the marginal sea was asserted by the National Government. We held that protection and control of it were indeed a function of national external sovereignty. . . . The status of Texas, it is said, is different: Texas, when she came into the Union, retained the *dominium* over the marginal sea which she had previously acquired and transferred to the National Government only her powers of sovereignty—her *imperium*—over the marginal sea. . . .

The Republic of Texas was proclaimed by a convention on March 2, 1836. The United States and other nations formally recognized it. The Congress of Texas on December 19, 1836, passed an act defining the boundaries of the Republic. The southern boundary was described as follows: "beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande." Texas was admitted to the Union in 1845 "on an equal footing with the existing States."² Texas claims that during the period from 1836 to 1845 she had brought this marginal belt into her territory and subjected it to her domestic law which recognized ownership in minerals under coastal waters. . . . Texas also claims that under international law, as it had evolved by the 1840's, the Republic of Texas as a sovereign nation became the owner of the bed and sub-soil of the marginal sea

concur in the opinion that the Charter imposed no legal obligation on South Africa to place the Territory under the Trusteeship System, sharing in general in the views expressed by Judge DeVisscher instead.

¹ Reed, Minton and Frankfurter, JJ., dissenting, and Clark and Jackson, JJ., taking no part in the decision.

² Amended Oct. 16, 1950, to read: "on an equal footing with the original States in all respects whatever."

vis-à-vis other nations. Texas claims that the Republic of Texas acquired during that period the same interest in its marginal sea as the United States acquired in the marginal sea off California when it purchased from Mexico in 1848 the territory from which California was later formed.

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We are of the view that the "equal footing" clause of the Joint Resolution annexing³ Texas to the Union disposes of the present phase of the controversy.

The "equal footing" clause has long been held to refer to political rights and to sovereignty. . . .

Yet the "equal footing" clause has long been held to have a direct effect on certain property rights. Thus the question early arose in controversies between the Federal Government and the States as to the ownership of the shores of navigable waters and the soils under them. It was consistently held that to deny to the States, admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States, since the original States did not grant these properties to the United States but reserved them to themselves. . . .

The equal footing clause, we hold, works the same way in the converse situation presented by this case. It negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State. Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. . . . When Texas came into the Union, she ceased to be an independent nation. She then became a sister State on an "equal footing" with all the other States. That act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States.

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It is said that there is no necessity for it—that the sovereignty of the sea can be complete and unimpaired no matter if Texas owns the oil underlying it. Yet as pointed out in *United States v. State of California*, once low-water mark is passed the international domain is reached. Property

³ By amendment on Oct. 16, 1950, the word "admitting" was substituted for "annexing."

rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign. . . . If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. That is the source of national rights in it. . . . Unless any claim or title which the Republic of Texas had to the marginal sea is subordinated to this full paramount power of the United States on admission, there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States. Yet neither the original thirteen States . . . nor California nor Louisiana enjoys such an advantage. The "equal footing" clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which other States have been excluded, just as it prevents a contraction of sovereignty . . . which would produce inequality among the States.⁴

War crimes.—jurisdiction to review Military Commission judgment

JOHNSON v. EISENTRAGER. 339 U. S. 763.

United States Supreme Court, June 5, 1950. Jackson, J.

Reversing the Court of Appeals for the District of Columbia, 174 F. (2) 961, this JOURNAL, Vol. 44 (1950), p. 185, the Court held that *habeas corpus* should not be granted to German nationals serving in Germany sentences imposed by an American military commission in China for the war crime of continuing to take part in hostilities against the United States after the German surrender of May 8, 1945 (chiefly through collecting and furnishing intelligence concerning American forces to Japanese forces prior to the Japanese surrender). The Court held that alien enemies taking active part in hostile operations outside of the United States had no standing to seek *habeas corpus*, saying in part:

the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.

⁴ Petition for rehearing, filed July 19, 1950 (No. 13, Original), was denied on Oct. 16, 1950. In the companion case of *United States v. State of Louisiana*, 339 U. S. 699, involving no historical claim such as that of Texas, the Court followed *United States v. California*, 332 U. S. 19 (1947) in holding that the Federal Government rather than the State had paramount rights over the sea-bed and subsoil, the only difference from the California case being that Louisiana had asserted rights 24 miles seaward of the three-mile belt. Douglas, J., said that: "We intimate no opinion on the power of a State to extend, define, or establish its external territorial limits or on the consequences of any such extension *vis à vis* persons other than the United States or those acting on behalf of or pursuant to its authority. . . . If, as we held in California's case, the three-mile belt is in the domain of the nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea." Petition for rehearing in this case (No. 12, Original) also was denied on Oct. 16, 1950.

The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long-established. By the Treaty of Versailles, "The German government recognizes the right of the allied and associated powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war." Article 228. This Court has characterized as "well-established" the "power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war." *Duncan v. Kahanamoku*, 327 U. S. 304, 312 And we have held in the *Quirin*¹ and *Yamashita*² cases . . . that the Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war.

It is not for us to say whether these prisoners were or were not guilty of a war crime, or whether if we were to retry the case we would agree to the findings of fact or the application of the laws of war made by the Military Commission. . . .

That there is a basis in conventional and long-established law by which conduct ascribed to them might amount to a violation seems beyond question. Breach of the terms of an act of surrender is no novelty among war crimes. . . . It being within the jurisdiction of a Military Commission to try the prisoners, it was for it to determine whether the laws of war applied and whether an offense against them had been committed.³

RECENT EGYPTIAN PRIZE COURT CASES

An Egyptian Prize Court was established July 8, 1948, following the outbreak of hostilities with Israel. A brief account by the President of this court¹ indicates that its composition and procedure were of the usual Continental type, and that some 400 cases had been brought before it. The decisions rendered which have become available in French translation or in summary appear to be in general conformity with those of the British, French and German prize courts during the two World Wars, and frequently cite such decisions, as well as the Declaration of London. The following cases may indicate the general nature of the cases which have been dealt with.

In *The Mariam*² the court condemned as an enemy vessel a Jewish-owned ship of Haifa which had left a North African port prior to the com-

¹ Ex parte *Quirin*, 317 U. S. 1, this JOURNAL, Vol. 37 (1943), p. 152.

² In re *Yamashita*, 327 U. S. 1, *ibid.*, Vol. 40 (1946), p. 432.

³ Black, Douglas, and Burton, JJ., dissented.

¹ Ahmed Safwat Bey, "The Egyptian Prize Court," *Revue Egyptienne de Droit International*, Vol. 5 (1949), p. 28. Summaries of various decisions were also made available by Mr. Wm. R. Vallance of Washington, D. C.

² Feb. 2, 1949. *Revue Egyptienne de Droit International*, Vol. 5 (1949), p. 141.

mencement of hostilities and was captured on arrival in Egyptian waters. Although presumed ignorant of hostilities, its capture was justified on the ground that international law in the eighteenth century permitted the condemnation of enemy vessels entering port without knowledge of a state of war, that relaxations of this rule in the nineteenth century depended upon reciprocity, that Hague Convention VI of 1907 provided that it was *desirable* though not compulsory to accord days of grace for the departure of enemy merchant vessels on the outbreak of war, and that this period for free departure had not in fact been allowed by many of the belligerents in World War I.

In *The Alga*³ property shipped before the outbreak of hostilities from Palestine to Genoa, and then transshipped on a neutral Italian vessel bound for South Africa, was seized at Port Said after the outbreak of hostilities and condemned on the ground of presumed continuing enemy ownership, since it was consigned to holders of bills of lading which were not produced. The protection of the neutral flag for enemy goods under the Declaration of Paris was held inapplicable, since neither the master nor the owner of the goods had presented this as a defense.

In *The Marine Carp*⁴ four shipments of goods exported from Palestine on an American vessel were released to their neutral owners, the court holding that even if the shipments continued to be enemy-owned, such property was protected by the neutral flag under the Declaration of Paris. No effect could be given to the order of the Military Governor General of July 6, 1948, calling for the confiscation of all goods "exported from Palestine, whatever may be their nature or destination, and whether they be of Palestinian origin or not," since the Prize Court was required to follow "the rules established in public international law." The court said that "All courts of prize apply international law and not national internal legislation, except when the latter is in the interest of the owner of the property seized, for then this legislation is considered as a renunciation by the captor State of certain of its rights to the prize." The attempt to cut off all exports from the enemy could not be justified by the British and French practice during World War I, since this action was taken solely by way of reprisals against Germany, and not being a part of general prize law, had not been applied as to exports from Turkey in World War I. However, one shipment of lemons, even if the property of the neutral consignee, was condemned as the "product of the enemy soil."

In *The Carbonello*⁵ the court rejected a claim for damages suffered through the action of the Egyptian authorities in detaining and unloading an Italian vessel bound from Eritrea to Genoa, since there was "probable cause" to delay and search the vessel.

³ Jan. 20, 1949. *Ibid.*, p. 139.

⁴ Sept. 21, 1949. *Ibid.*, p. 155.

⁵ May 12, 1949. *Ibid.*, p. 153.

Several decisions involved contraband. In *The Hemland*⁶ lacquer gum shipped prior to hostilities from Calcutta for Tel Aviv via Genoa, and seized while en route to Genoa, was condemned as absolute contraband with enemy destination by reason of the doctrine of continuous voyage, even though it was not contraband when shipped.⁷ In *The Denis Gulu*⁸ the court condemned a cargo of bran, shipped on a Turkish vessel for Haifa; the intention of the neutral shipper and owner that it should not be used to help the enemy would make no difference, its hostile destination being regarded as a question of fact.⁹ The master's claim that he entered Egyptian waters under stress of weather was disregarded, on the ground that contraband could be seized either on the high seas or in belligerent territorial waters.

In *The Klipfontein*¹⁰ old clothes and shoes sent as gifts for civilian relief and consigned to the American Joint Distribution Committee were condemned as enemy property and conditional contraband. The court said that the clothing could be used by combatants, and that even if employed for civilian relief, "by the fact of mobilization of all the resources of the country and the employment of civilians for defense operations or to aid the military, this clothing serves to increase the war effort and should be considered conditional contraband."¹¹

In *The Hoegh de Vries*¹² the enemy destination of pepper shipped from Singapore to the order of the Commercial Bank at Haifa was found in the hostile character of the consignee's domicile, this rule being selected in preference to that of nationality as the criterion of enemy character. In *The Derwenthall*¹³ a cargo of tea from India consigned to a neutral company at Cyprus for the account of another neutral company there was held to have a presumed enemy destination because the latter company was an importing and exporting firm with branches in Palestine, the port of destination also being reputed to be used for contraband trade with Palestine. However in *The Nord Cap*¹⁴ goods shipped on a Danish vessel to an Arab at Jaffa, Palestine, were held not to have an enemy destination, since

⁶ Feb. 8, 1949. *Ibid.*, p. 144.

⁷ See also *The Empire Pickwick*, March 8, 1949, *ibid.*, p. 148.

⁸ March 8, 1949. *Ibid.*, p. 145.

⁹ The court remarked that the vessel would also be liable to condemnation, since the weight of the contraband condemned was more than half the tonnage of the vessel.

¹⁰ March 8, 1949. *Ibid.*, p. 147.

¹¹ See also *The Bataan*, March 17, 1949, *ibid.*, p. 150, condemning a shipment of used women's clothing shipped before hostilities to the Women's Zionist Organization in Tel Aviv and stored in an Egyptian warehouse at the time of seizure; this was regarded as conditional contraband and as enemy property which lacked any protection from a neutral flag since it was stored on land at the time of seizure.

¹² Jan. 7, 1950. Summary made available by Mr. Vallance.

¹³ Dec. 17, 1949. *Ibid.*

¹⁴ March 17, 1949. *Revue Égyptienne de Droit International*, Vol. 5 (1949), p. 149.

shipped prior to the Israeli occupation of Jaffa and since the consignee had taken refuge in Lebanon. In *The Narrandera*¹⁵ metallic currency sent by an Australian bank to Barclay's Bank at Haifa was released, since shipped before the war to a port which remained under British control and not in enemy occupation until August 1, 1948, though the currency was declared to be absolute contraband.

In *The Frankisky*¹⁶ a cargo of food on a Greek ship bound for Tel Aviv and seized off Gaza was condemned as absolute contraband, in view of the undertaking of the Israeli Government to support its whole population with food during the hostilities, and the fact that Tel Aviv was a military base. The vessel was also condemned, since the only cargo actually carried was contraband, even though the cargo amounted to only one-tenth of the tonnage capacity of the ship. Money and securities on board issued by Israel were subject to confiscation as part of the wealth of that country, but money and checks issued in neutral countries were not to be condemned in the absence of proof of enemy ownership. Clothing, bedding, books and correspondence of the crew could not be seized, in view of Article 29 of the Declaration of London, regarded as still applicable.

¹⁵ April 28, 1949. *Ibid.*, p. 152.

¹⁶ July 21 and Oct. 22, 1949. Summaries made available by Mr. Vallance.

BOOK REVIEWS AND NOTES

Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946 (Official English Text). Compiled by the Secretariat of the Tribunal under the authority of the Allied Control Authority for Germany. Nuremberg: International Military Tribunal, 1947–1949. 42 vols. (Distributed in the United States by the Department of State.)

“This inquest represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times—aggressive war.”¹ “Never before in legal history has an effort been made to bring within the scope of a single litigation the developments of a decade, covering a whole continent, and involving a score of nations, countless individuals, and innumerable events.”² These words, used by Mr. Justice Robert H. Jackson, Chief of Counsel for the United States, in opening the case for the prosecution, probably constitute as clear a picture of the object and scope of the trial as any which could be written. No trial in history, with the exception of that which led to the Crucifixion, has been the subject of such world-wide interest and controversy and the basis of such voluminous written comment as has this one. Henceforth it will occupy the primary position in legal and romantic history formerly jointly shared by the trials of Joan of Arc and Mary Queen of the Scots. Not only does the record present a complete and detailed history of Germany and its foreign relations for the past twenty years, but it delves into the innermost study of its politics, its government, its basic culture and its law. Not only is it a profound study of international law, but it exposes all the greed, the cruelty, and the emotions of a group of ambitious men under the leadership of a fanatic. It is a recital of history as it was being made that has never before been achieved.

From the point of view of the sheer mechanics of its production, the record must have presented a tremendous undertaking. Forty-two volumes varying from 365 pages to approximately 800 pages per volume offer a task in editing that no single author or combination of authors would attempt without misgiving. When it is considered that the compilation resulted from the translation of four widely differing languages, obtained under the most unfavorable conditions, the remarkable freedom from errors, grammatical, typographical, and translational, is in itself a remark-

¹ Vol. I, p. 99. Unless otherwise noted, all references are to volume and page number in the record of trial.

² *Ibid.*, p. 100.

able feat. The proceedings were recorded in full by stenographic notes, and electric sound recordings of all oral proceedings were obtained. The finished work necessitated verification, in the four languages, of all citations, statistics, and similar data. As a result of the painstaking preparation, the work is as near an accurate record of the trial as can be obtained.

In reality, the forty-two volumes contain two separate yet related sets of books. The first series, Volumes II to XXII, deals solely with the proceedings of the trial. Volumes XXV to XLII, which constitute the second series, are devoted exclusively to the documentary evidence employed. It must be noted that the documents contained in these volumes do not necessarily represent all the documents used to prepare the prosecution's case. Due to the ruling of the Tribunal that it would treat no written matter as in evidence unless it was read in full, word by word, in the Court, in some cases only the most vital parts of the basic document are contained in the record.³ Of the remaining volumes the first one is devoted to the official documents of the trial, while Volumes XXIII and XXIV constitute index volumes, Volume XXIII being a chronological and subject index, while Volume XXIV is devoted to an index of names and documents. An errata sheet is also to be found in this index.

It is almost impossible to comment on Volumes II to XXII without commenting on the trial itself. So much has been written, *pro* and *con*, on the subject of the Nuremberg Trial that the reviewer is reluctant to add more to the ever-increasing number of papers and books. However, we cannot read at length in the proceedings without becoming aware of certain glaring points upon which some comment should be made. The trial, like all trials, presents certain highs and lows which alternately stimulate the reader to continue with interest or to read on with dogged determination to finish a monotonous task. One cannot and should not expect a record of trial to read like the result of scientific research, a textbook or a novel. It must be approached with full understanding that it is the written record of the spoken word and not a carefully polished, coherent and logical analysis. The reader will find certain sections to be of intense interest, while, to the non-legal trained mind, others will be simply a dreary recital of seemingly unimportant facts.

In general, the proceedings leave one with the impression of having witnessed a carefully staged performance in which the participants are acting parts, solely for the benefit of posterity. In spite of protestations to the contrary, the proceedings give the impression of a trial in which the verdict has been found prior to the contest, thus reducing the actual proceedings to an effort to justify the verdict. One sees clearly, from the outset, that the record will be unimpeachable, that the evidence will be

³ A more complete record of documents employed appears in English in *Nazi Conspiracy and Aggression* (U. S. Government Printing Office, 1946).

exact and unassailable. It is this, perhaps, more than anything else, that magnifies the petty quality of numerous incidents which serve to detract from the dignity of the record or to make one wonder if the Nuremberg Trial, as a demonstration of the justice of democracy, had the profound impression on the German people for which we hoped.

As is to be expected, most of the incidents which fall in this class occurred on the side of the prosecution. The early proceedings spend much time dealing with the failure of the prosecution to furnish the essential documents to the defense. Numerous discussions took place between the Court, the prosecution and the defense.⁴ The defense constantly appealed to the Court on the grounds that the documents had not been delivered or had been delivered in insufficient numbers. At one point the Court requested the prosecution to allow the defense to have at least one copy between each two counsels.⁵ In each case the excuse was the same—the documents had been sent to the Defendants' Document Room by the prosecution. From this point on, they knew nothing. The difficulties in making additional translations, etc., was a standard excuse until it was discovered that 250 copies of documents were furnished to the press while only five were furnished to the defense. The press received the documents before the defense. Evidence discloses that in many cases the defense had access to documents only 24 hours in advance of their introduction.⁶ Such incidents as these serve to detract from the dignity of the trial and definitely appear unfavorable to the prosecution in the record.

Certain other incidents of this type merit mention. Relative to the introduction of evidence, allegedly a document purporting to be a memorandum prepared by Rosenberg or one of his staff, the prosecution was asked if the document was signed by Rosenberg or in his handwriting. The prosecution admitted that neither was true, but "It was in the Rosenberg File." When asked if there was anything to indicate the defendant's authorship, it was admitted that there was not.⁷ On the basis of the prosecution's assumption of authorship, it was admitted. A record of such importance is not enhanced by these tactics. At the beginning of the presentation of the case for the defense, an argument occurs as to the requirement of the Tribunal that the prosecution pass on the relevancy of documentary evidence, the calling of defense witnesses, etc.⁸ Such a ruling and such an argument do not appear to be compatible with the American idea of justice. Normally, under our system, it is presumed that the defendant shall be allowed to call such witnesses as he desires and to present his case without being forced to submit it to the consideration of the prosecution before presenting it to the court. A further criticism

⁴ Vol. II discloses an almost daily discussion on this subject.

⁵ Vol. II, p. 190.

⁶ *Ibid.*, pp. 291-298.

⁷ Vol. III, pp. 350-353; see also p. 155 for a similar incident.

⁸ Vol. VIII, pp. 161-164.

which may be made is the insertion of the gratuitous editorial comments of the American prosecutors on several occasions. For example, in commenting on a note allegedly exchanged between Admiral Horthy and Hitler, counsel remarked: "I suppose he needed some headwaters for the non-existent Navy of which he was Admiral"; and a little further on: "He doesn't like to use big words, 'big blow' is sufficient."⁹ While these things are, perhaps, of minor significance, they serve to detract from the dignity of the record and are not in keeping with the solemnity of the task entrusted.

Some criticism must be made of the presentation of the prosecution's case from the point of view of technique. While it is recognized that the trial was of the greatest importance, many of the speeches accompanying the presentation of documentary evidence were lengthy to the point of monotony. This is particularly true in the case of the evidence relative to the charge relating to aggressive warfare. The evidence concerning Austria occupies 182 pages for the introduction of documentary evidence alone.¹⁰ One receives the impression, due to the extreme difficulty in following the reasons for the introduction of seemingly petty, irrelevant facts, that the prosecutors made the most of their chances to write history.

Praise should be given to Lord Justice Lawrence for his excellent service as the President of the Tribunal. Without doubt, his work will come to be considered as outstanding in all legal history. Of special interest, also, is the opening address of Mr. Justice Jackson.¹¹ His presentation, reasoning, and the general quality of his address could well serve as a model for all trial lawyers. His comments on the law of the case, the international law and the responsibility of the Tribunal deserve to be reproduced in their entirety.¹²

One of the finest pieces of historical summary is to be found in the sessions of the first day in the reading of the indictment.¹³ This summary of the crimes of the accused and their state are as clear and concise a presentation as will be found anywhere in the record. Of special historical significance is the presentation of the description of the organization of the *NSDAP* by Robert G. Albrecht, and the discussion of the rise to power of the *NSDAP* by Major Frank Wallis.¹⁴ Both of these presentations together constitute a valuable and precise study on the Nazi organization which will be a source of much gratification to the serious student.

Of particular interest to the specialist in international law is the section dealing with the specific violations of the Hague Conventions contained in the indictment, and in the listings of the treaties violated by Germany.¹⁵ Appendix C on page 87, Volume II, is a particularly valuable summary

⁹ Vol. III, p. 155.

¹¹ *Ibid.*, pp. 98-155.

¹³ Vol. II, pp. 80-94.

¹⁵ Vol. III, pp. 94-115.

¹⁰ Vol. II, pp. 248-393, 394-431.

¹² *Ibid.*, pp. 142, 147, 152.

¹⁴ *Ibid.*, pp. 162-202.

of the former. The explanation of Sir Hartley Shawcross concerning the legality of the trial should be read before reading the proceedings, including, as it does, the treaty violations referred to above.¹⁶ In the presentation of the case for Czechoslovakia the reader will find an excellent account of the organization established by Hitler to anticipate and deal with the violations of international law.¹⁷ This amazing revelation of planning makes one realize for the first time the completeness of the Nazi program to dominate the world.

The prosecution's case fills the first eight volumes, while that of the defense occupies the remainder of the twenty-one devoted exclusively to the proceedings. In connection with the defense one of the most brilliant addresses of the trial was made by Dr. Otto Stahmer, counsel for Goering, in his presentation of a motion adopted by all defense counsels.¹⁸ This address states the case for all those who opposed the Nuremberg Trial and may well serve as the basis on which posterity may criticize and condemn us for the action. Neither the address nor its reasoning can be overlooked.

The defense must be divided into two parts: the action and testimony of those who realized the magnitude of their crimes and, without defending themselves against the charges, manfully contributed their knowledge and explanations to serve the interests of history. In this group we may place Goering, Von Ribbentrop and Von Papen.¹⁹ Goering, in particular, deserves comment. There is no impression here of a man fighting for his life or attempting to justify his actions. One feels that he is merely explaining the why and how of his actions and those of his country with no hope of defending himself. His conduct as a witness tends to excite a slight feeling of admiration in spite of his obvious misdeeds. Much of this may be translated to the other two mentioned. In these cases there is also present an air of cunning and an underlying sense of a tongue-in-cheek attitude which serves to detract from their efforts. The testimony of some of the purely military leaders is also open to admiration in their attempts to justify the military aspects of Germany's bid for power.

For the remainder of the defendants, one can feel only contempt. The reviewer is reminded of an old cartoon depicting the Tweed Ring of New York as a group of unsavory individuals standing in a circle, each pointing his finger at the other, saying, "It was him." The efforts of the purely Nazi leaders to shift the blame and to plead innocence and lack of knowledge is a sorry exhibition at the best. One may be thankful they have departed. Their obvious effort to wheedle, to plead, to deny, and to crawl is sickening.

As a series of reference books on Germany between the years 1920 and 1945, these volumes will remain without an equal. They will be of value

¹⁶ *Ibid.*, pp. 92-145.

¹⁸ Vol. I, pp. 168-170.

¹⁷ *Ibid.*, pp. 58-90.

¹⁹ Vols. VIII, IX, X, XVI.

to lawyers, political scientists, historians, economists and psychologists. A set should be in every college library, and available to all those who seek a greater knowledge on the causes of the world's problems.

JOHN E. KIEFFER

Trial of Nikolaus von Falkenhorst. (War Crimes Trial Series, Vol. VI.)

Edited by E. H. Stevens. London: William Hodge & Co., 1949. pp. xlii, 278. Appendices. Maps. Index. 18 s.

This is the latest to appear in a long series, *Notable British Trials*, reporting such famous cases as those of Mary Queen of Scots and Captain Kidd, Oscar Wilde, the "Bounty" Mutineers and "Lord Haw-Haw." As Volume Six of the British War Crimes Trials of "minor" Nazi offenders, this book contains the transcript of the trial of Nikolaus von Falkenhorst, one-time Commander-in-Chief of the German Armed Forces in Norway, the sentence of the Court Martial, and, as appendices, a number of relevant documents. There is also a foreword by Sir Norman Birkett and a long introduction by the editor, the late E. H. Stevens, presenting an excellent review of the entire case.

The charges against the defendant were in substance as follows: (1) a general allegation that he had ordered the forces under his command to give no quarter to Allied Commandos, and promptly to put to death any that were captured; (2) certain specific allegations concerning individual Allied troops or units claimed to have been unlawfully executed, without trial, although prisoners of war. These charges involved a fair cross-section of the varied types of Commando operations, embracing exploits by submarines and midget submarines, motor torpedo boats, and glider-borne troops. The defendant pleaded not guilty to all nine counts, was found guilty on seven, and was sentenced to death by the Court. This sentence, however, was later commuted to twenty years' imprisonment.

The case turned mainly on the interpretation of the *Führerbefehl* issued by Hitler under date of October 18, 1942, ordering the killing of Commandos sent to Norway by air or sea to effect various missions of destruction or espionage. As this order had wide repercussions in all theaters of war, the present trial is of great importance as a precedent, since the responsibility of a very senior officer for executing it is examined in great detail.

In his able defense, the defendant maintained stoutly that he was merely passing on an order from Hitler which he was bound to obey or suffer severe penalties. This familiar defense of Nazi war criminals was rebutted by equally familiar evidence that according to British, American, and even German war manuals, the rule of *respondeat superior* was no defense (although relevant to justify mitigation of punishment) if the inferior transmitted orders he knew to be manifestly unlawful. It was

also shown that von Falkenhorst had not merely handed on the order from Hitler, but had unnecessarily amended this order in a way to make it even more sweeping than it had been originally. It was likewise suggested that even under Hitler no officer was actually obliged to carry out an order considered inhuman; he always had the alternative of resigning his command.

The other main defense upon which the defendant relied was the claim that the Commandos were not legitimate soldiers, but mere *saboteurs* and thus not entitled to treatment as prisoners of war. This defense was met by a showing that there was no evidence in the Hague Rules, the Geneva Rules, or elsewhere that a *saboteur* could properly be treated as a war criminal; also, that even if this Nazi claim could be substantiated, the defendant was nevertheless guilty, because the so-called *saboteurs* were shot without the semblance of a trial, to which even a spy is entitled under international law.

It appeared that von Falkenhorst had made some efforts, albeit rather vague, to attenuate the rigor of the *Führerbefehl*, an order of which he was clearly ashamed, and it was probably this evidence, plus the weight of the *respondeat superior* rule, that was instrumental in obtaining the commutation of his death sentence.

Unfortunately, the value to international lawyers of this important and interesting trial is somewhat weakened by the fact that neither the finding nor the sentence is accompanied by reasons. Thus the court's exact ruling as to the defenses set up by the defendant, which is the vital matter here, must be deduced from the other trial proceedings, especially the closing speeches for the defense and prosecution, plus the summing up by the Judge Advocate.

JOHN B. WHITTON

International Law. By L. Oppenheim. 7th ed. by H. Lauterpacht. Vol. I: *Peace*. New York and London: Longmans, Green & Co., 1948. pp. liv, 940. Appendices. Index. 70 s.

Oppenheim published his original work in 1905-1906, the two volumes appearing a year apart. A second edition was published by the distinguished author in 1912-1913. He died on October 7, 1919. The third edition was published in 1920-1921 under the editorship of Roxburgh. McNair, the editor of the fourth edition, which was published in 1926-1929, warned the reader that "if on any point he wants the author's *ipsissima verba* he must refer to the second edition, and then examine the third edition in the light of Roxburgh's prefaces." A considerable amount of the text of the third edition was put either into footnotes or smaller type. George Grafton Wilson, who reviewed the fourth edition, observed that "sometimes parts of the text itself have been changed or omitted

altogether." He added that if this method is to be continued by future editors, "the original point of view of Oppenheim, which a reader might wish to know, would require considerable research to discover" (this JOURNAL, Vol. 21 (1927), p. 398). Francis Deák, who reviewed the fifth edition, published in 1936-1937, the first revision by Lauterpacht, felt that Professor Wilson's fear had turned out to be not unwarranted (this JOURNAL, Vol. 30 (1936), p. 561). The present reviewer thinks the same criticism applies to the seventh edition by Lauterpacht.¹

Deák raised the question whether the fifth edition "can still justifiably bear the name of Oppenheim." In view of the lapse of over thirty years since Oppenheim's death, years filled with dynamic transformations in international relations which no one could have envisaged during Oppenheim's lifetime, the present reviewer believes that his great contribution to the science of international law should be allowed to rest in peace with him, and that future revisionists should be content to stand upon their own laurels. Besides the increasing confusion in distinguishing between Oppenheim's own work and that of his revisors, a few obvious observations will lend support to this suggestion.

In quantity of words the first volume of the seventh edition is forty per cent larger than the first volume of Oppenheim's second edition. The bibliographies in the revised editions are several times greater in length than those of Oppenheim. This is accounted for in part by the larger number of works of international law now available, but is due also in part to the expanded use of periodical literature in the recent bibliographies. In the preface to his original edition Oppenheim stated: "As a rule I have avoided giving reference to articles contained in periodicals" (p. viii).

It is apparent to every reader that when Dr. Lauterpacht discusses the League of Nations, the Pact of Paris for the Renunciation of War, the United Nations, and the Nuremberg Trial, he is not suggesting that there is any connection between these developments after Dr. Oppenheim's death and the views he expressed in his original treatise. However, Oppenheim's professed method does not appear to have been followed in treating of the effect of these experiments upon international law. He explained his method as follows: "I have been careful to avoid pronouncing rules as established which are not yet settled. My book is intended to present international law as it is, not as it ought to be" (p. iv). What influence, if any, the League of Nations has had upon international law is certainly not affirmatively established; the legal effect of the Pact of Paris claimed for it by Dr. Lauterpacht is not in consonance with the practical construction of the parties to it and has not received general acceptance; the place to be occupied in the international law of the future by the rules applied

¹ The sixth edition, also by Lauterpacht, was published in 1947. It was not reviewed in the JOURNAL, apparently because a review copy was not received.

in the trial and conviction of the Nazi leaders at Nuremberg for the politically conceived *ex post facto* "crimes against peace" remains to be developed; and the viability of the collective security principles of the Charter of the United Nations is now receiving its first test upon the battlefield in Korea, after five years of flagrant mockery by one of the five great Powers placed above the law by the very terms of the Charter itself.

GEORGE A. FINCH
Editor-in-Chief

Le Développement et la Codification du Droit International. By Yuen-li Liang. Paris: Recueil Sirey, 1949. pp. 126.

The publication on behalf of the Academy of International Law at The Hague of this extract from the series of lectures by the Director of the Division for the Development and Codification of International Law of the Secretariat of the United Nations should be warmly welcomed by all students of the subject. Not only is the study up to the high standard to be expected from so competent a scholar, but it gives evidence that the Hague Academy may become once more, as in the period between the two World Wars, an annual meeting-ground for the leading jurists of the world and may inspire the coming generation of students as it inspired an earlier generation in past years.

Dr. Yuen-li Liang has written so extensively upon legal questions arising in connection with the activities of the United Nations that he needs no introduction to students of international law. What he has done here is to give us the historical background of the development of international law by conferences, a survey of the methods suitable to the development of international law and its codification, and a detailed analysis both of the creation and organization of the International Law Commission of the United Nations and of the problems which it has undertaken to study. Perhaps the most useful chapter is that in which he describes the methods which are appropriate to encourage the progressive development of international law and its codification. A distinction is made between the progressive development of international legislation, the development of international customary law, and the development of jurisprudence. Then follows an examination of the methods suitable to the codification of international law as distinct from the development of the law, in particular the use of the convention as a method of codification and the scientific "restatements" of international law.

The International Law Commission of the United Nations has a challenging task before it. Will it content itself with seeking to clarify branches of the law of minor importance, hoping that progress in those fields may encourage the General Assembly in seeking the solution of more

important problems? Or will it boldly proclaim the deficiencies of the present system of collective security and take the lead in showing what principles of law must be accepted if collective security is to be made a present reality? It is to be hoped that the Commission will not hesitate in making the latter choice; for, once more, as in the days following World War I, the foundations of the system must be solidly constructed if the superstructure is to be more than a decorative façade. The world has become aware of the inadequacy of the foundations laid at San Francisco in 1945. The International Law Commission must now accept the responsibility put upon it and tell the international community what principles of law must be adopted to meet the situation.

Dr. Liang shows that he is aware of the field of activity that lies before the International Law Commission if it chooses to exercise the initiative assigned to it by Article 18 of its Statute. To say that the question of collective security is a "political" one does not make it any the less imperative for the Commission to formulate the principles upon which the political problem may be reduced to a legal one.

C. G. FENWICK

Legal Effects of War. (3rd ed.) By Sir Arnold Duncan McNair. Cambridge: Cambridge University Press; New York: Macmillan Co., 1948. pp. xxiv, 458. Appendices. Index. \$6.00.

This new edition of Judge McNair's work is practically identical with the second edition, published in 1944, which Edgar Turlington reviewed in detail in this JOURNAL, Vol. 39 (1945), pp. 134-135. The additional 42 pages belong to the Appendix and contain the full text of the Frustrated Contracts Act of 1943 and of the Limitations Act of 1945. Foreign lawyers will also welcome the reprinting in the Appendix of two articles by the author, the one commenting on the Frustrated Contracts Act, the other dealing with problems concerning the requisitioning and the *situs* of merchant ships.

Legislative changes of importance made in England after 1944, such as the Marriage Act of 1947, are in some instances referred to in the text, but more often in footnotes. The chapter dealing with the effect of peace treaties on private rights remains as written in 1941, but reference is made in a few notes to the 1947 Treaties. Yet important new problems are not ignored. Thus, a note on page 402 mentions the Washington Agreement of 1946 concerning German assets in Switzerland and the controversy between the Allied Powers and Switzerland, while another (page 354) deals with the rather unique status of Germany following its surrender. However, the author refrains from "taking sides" and, as to the German problem, foresees that "the English courts may some day have to consider the legal basis of laws made by the Allied Control Commission regulating

matters outside the normal sphere of the activities of an occupant." It is hard to say whether such reserve indicates the author's doubts with respect to the legality and validity of the Control Commission's enactments or is due to the understandable hesitation of a member of the International Court of Justice to pass on a delicate question which might grow into a "case." We are looking forward to the answer in the next edition of this excellent work, which continues to be the leading authority on the effects of war under the law of England.

DAVID AVRAM

A Treatise on the Law of Prize. (3rd ed.) By C. John Colombos. London: Longmans, Green & Co., 1949. pp. xiv, 422. Table of Cases. Index. 30 s.

This well-known *Treatise on the Law of Prize*, covering the whole law of prize in Great Britain and most other nations, has now been published in a third edition. As the second edition appeared in 1940, the new edition differs primarily by working in the law of prize of World War II. Although the relevant prize decisions have by no means yet been published completely, and the subject awaits, therefore, a definitive study, the author has been able to make use of 150 different prize decisions rendered in the last war.

Some novel cases appeared, but in general the prize law of World War II offered hardly any striking innovations, but tended rather toward the clarification and expansion of the principles laid down during World War I.

Not all the author's statements can be accepted. The lawlessness of World War II was much greater than would appear from this book. The work has, of course, a strong British flavor. The author is impressed with the "admirable impartiality and sense of justice which has, at all times, inspired the judgments of the British Prize Courts" (p. 354). While this is, generally speaking, true, yet Professor Verzijl had gained a different impression. The author knows only German violations and upholds Great Britain's undoubted right to retaliation. British violations are called "departures from generally recognized principles." The latter are justified by "changed, modern conditions," such as "black-lists," deviation of vessels for visit and search, and so on. Although the author recognizes that the British "blockade" was no blockade in the sense of international law and also cannot be justified by the law of contraband, as this does not extend to exports of the enemy, he holds that blockades are "now impracticable" and that "long-range blockades must be accepted under modern conditions." On the other hand, unrestricted submarine warfare is illegal, and if under modern conditions the right of capture cannot be exercised in accordance with international law, the submarine

should allow a merchant vessel to pass harmless before its periscope. It is rather amazing that the author, who mentions the Nuremberg Judgment, seems not to know that this Judgment refused to hold Admiral Dönitz guilty on this ground, "in view of all the facts proved and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at sight in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that Nation entered the war."

But the author regrets the discontinuation of the VIth Hague Convention (days of grace), deplors the narrow construction given to the words "at sea" as to vessels met at sea in ignorance of hostilities and as to postal correspondence. He recognizes that "the great danger of retaliation is that, as at present exercised, it rests more on political than legal considerations" (p. 283).

He strongly urges the revision of the laws of maritime warfare; hints, like A. H. Smith, at the possible distinction between small and "major" wars; insists, in the light of experience, on clear and precise formulation; and holds that, particularly, the whole law of contraband and the whole subject of reprisals need complete revision. In his discussion of an International Prize Court he urges, now that the London Declaration of 1909 has been abandoned, that the United Nations, under Article 13(1)(a) of the Charter, unify the rules of the law of nations. It is hardly necessary to recall that under the prevailing climate of voluntary blindness and the policy of the ostrich, so fashionable since 1920, absolutely nothing is likely to be done on these lines.

Prises Maritimes. Jurisprudence Française de la Guerre 1939-1945. France, Ministère de la Marine. Tome I: 1940-1946. Paris: A. Pedone, 1947. pp. xxiv, 518. Index.

This is the first volume of French prize cases decided in the war of 1939-1945. It is a careful edition, starting with the text of the corresponding municipal laws and giving about 70 decisions of the *Conseil des Prises* and 7 *Décrets en Conseil d'Etat*. Many indices and an excellent analytical table enhance its value.

It is not possible, within the framework of a book review, to present or discuss the many problems involved. In general it may be said that this volume will again show, when a definite study of the prize law of World War II is written, corresponding to Verzijl's monumental work on the prize law of World War I, that prize law is still an important part of international law. While English and German methods of conducting maritime war have certainly reduced the volume of cases coming before prize courts, the problems and the law have remained largely the same. World

War II seems not to have brought about many very "novel cases" or new developments of prize law, but rather have led to elaborations of principles and decisions laid down in World War I.

The French prize decisions of this war are, of course, influenced by the fate of France. The majority of merchandise or vessels seized were seized in 1939 and 1940, before the fall of France. Only about 13 prize decisions were delivered during this time. During the years of occupation about 26 decisions were rendered and they make a very different impression. The prize court was no longer sitting in Paris, but at Royat. In many cases the merchandise seized in 1939 had been released by the Ministry of the Navy and the prize decisions consist merely in the words: "*Non-lieu à statuer.*" During this period many cases were brought for indemnity for prolonged detention and quite a few were granted.

With June 11, 1945, begins a new era of prize decisions in liberated France, with the prize court sitting again in Paris. Special problems arise. Highly interesting are the cases (pp. 343, 363, 367, 370), concerning merchandise shipped to Swiss firms, which involve the range and interpretation of the Franco-Swiss Treaty of April 25, 1940, by which Switzerland tried to secure the imported goods necessary for the life of the country. The cases, involving the seizure in 1943 of Italian ships abandoned by their crews in Tunisian ports, bring up the validity of the Franco-Italian Armistice of June 24, 1940, "never recognized by the Free French Forces and the National Committee"; this armistice, it is argued, had become void on April 12, 1943, when the Italian Government, acting together with the German Government, had occupied the so-called Free Zone of France and the whole of Tunisia, in violation of fundamental dispositions of this Armistice; with that, it is held, the armistice came to an end, and a state of war existed at the time of seizure between France and Italy.

On the other hand the capture of an Italian vessel, on October 31, 1944, while transporting Italian civilians from Tripolitania to Sicily, was annulled for the reason that the Armistice between the United Nations and Italy of September 3, 1943, contained no reservation of the right of prize during the armistice, and, therefore, under general international law, the right of prize can no longer be exercised after maritime hostilities have come to an end.

JOSEF L. KUNZ

Retaliation in International Law. By Evelyn Speyer Colbert. New York: King's Crown Press, 1948. pp. x, 228. Index. \$3.00.

This is a welcome monograph on a subject of considerable current interest. The author traces the history of reprisals from private retaliation as practiced from the 13th century to the consolidation of the modern state in the 18th. It was the purpose of private retaliation to enforce, on be-

half of an individual, judicial remedies to which he appeared to be entitled but which were denied to him in some foreign jurisdiction. The procedure was regulated accordingly, either by local law or by treaty, and it was at all times carried out or, at least, licensed and supervised by the Sovereign. On the other hand public reprisals, which became customary during the 18th century, represent a continuous and progressive legal deterioration of the original institution. There is, eventually, no proof of the actual damage required, nor, as a rule, the previous exhaustion of local remedies. The principle of proportionality is widely ignored and the procedure deprived of all such standards and regulations as used to control it during the preceding centuries. While private reprisals aimed only at recovery for, and to the extent of, the damage done, the purpose of public reprisals is punishment. In fact, peacetime and, especially, wartime public reprisals are "regulated neither by the law of peace, nor by the law of war." The author calls for appropriate regulations rather than for the abolishment of retaliation, considering that it continues to be necessary as a method of law enforcement—however imperfect—as long as better methods are not available.

This work represents a substantial contribution to the study of an institution which, for practical as well as for scientific reasons, deserves more attention than it has attracted. The material, gathered from many primary sources, should facilitate and induce further research in a field particularly fascinating for a strange interrelation between sovereign lawlessness and man's longing for justice.

DAVID AVRAM

Reports of International Arbitral Awards. Collected by the Registry of the International Court of Justice. Lake Success: United Nations, 1948-1949. Vol. I, pp. 4-614, \$6.00; Vol. II, pp. 615-1369, \$7.00; Vol. III, pp. 1371-2231, \$7.00. Indexes.

The availability of international arbitral awards has always been a problem for courts, practitioners, and scholars. Except for the Permanent Court of International Justice, reliance had to be placed upon incomplete unofficial collections or the time-consuming and frequently evasive pursuit of the official texts of occasional awards. There being no systematic collection of such awards, the Secretariat of the United Nations and the Registry of the International Court of Justice planned the present series, to be prepared by the Registry with the authorization of the Court.

Although the foreword states that "it was decided to limit the collection strictly to international decisions, i.e., those rendered between States," covering the period since 1918, no decisions of the various Mexican or Panamanian or German mixed claims tribunals are reproduced. The reason assigned for not including the judgments and advisory opinions of the

Permanent Court of International Justice, valid because of the extensive documentation of that Court, is curiously attributed to the fact that they appear in Hudson's *World Court Reports*. Awards of "the Permanent Court of Arbitration" since 1918 are included, even though they appeared in Scott's *The Hague Court Reports*.

All in all, fifty-nine awards are reprinted in English or in French in the three volumes, commencing with the Portuguese Religious Properties Case of 1920 and concluding with the Trail Smelter Arbitration of 1941. One finds here the French Claims Against Peru (1920), the Norwegian Ship-owners' Claims (1922), the Ottoman Public Debt Case (1925), the Landreau (1922) and Chevreau (1931) Claims, the British Claims in the Spanish Zone of Morocco (1925), the Finnish Ships Claim (1934), and others too numerous to detail. The convenience and value of having these texts readily available are immeasurable.

The editing of the awards unfortunately leaves much to be desired. References as to each case are to a bibliography in Volume III. Consultation of the bibliography often fails, however, to indicate the source of the text selected for reproduction in these volumes. One can only hope that, among sometimes half a dozen citations to the "text of the award," the official text of the international tribunal was selected for reprinting. As far as the reviewer can determine the texts are reliably reproduced.

The utility of the volumes is increased by various devices such as a table of cases, a list of arbitrators, an alphabetical list of agents, counsel, and experts, a list of treaties cited, a list of authors quoted, bibliographies of collections, digests and other works on international arbitration, and special bibliographical references on the individual cases reprinted, and by a comprehensive index which occupies 166 pages of the third volume.

The utility of this collection far outweighs its editorial deficiencies and no serious laborer in the vineyard can afford to be without it. It is fervently to be hoped that the current series, covering the years 1918 to 1941, will be followed by other series covering the periods prior to 1918 and subsequent to 1941.

HERBERT W. BRIGGS

The Law of the United Nations: A Critical Analysis of its Fundamental Problems. By Hans Kelsen. London: London Institute of World Affairs, 1950. pp. xviii, 904. Appendices. Index. £5 5s.

During the past five years Professor Kelsen has contributed to widely scattered journals a long series of profound and provocative studies of various aspects of the law of the United Nations. The publication of the present comprehensive treatise is, therefore, a notable and long awaited event.

Despite the exhaustiveness of his treatment, the author has set for him-

self a restricted purpose: to furnish a critical analysis of the legal nature, organization and functions of the United Nations, based upon a strictly juristic approach. This does not, of course, imply any underestimation on the author's part of the importance of the political aims or activities of the United Nations, but results from his rigorous differentiation, fundamental to his general theory of law, between political ends, which can be set only by the lawmaker, and problems of legal technique, which are the proper province of the jurist. Political issues cannot, as the author points out, be altogether eliminated, but in "a merely juristic inquiry the political ends of the law-maker, in so far as they are ascertainable in an objective way, are taken for granted, and hence, not subjected to a criticism, except to the degree that it may properly be restricted to the law as a means to these ends. . . . It is not superfluous to remind the lawyer that as a 'jurist' he is but a technician whose most important task is to assist the law-maker in the adequate formulation of the legal norms" (p. xiii).

Having thus defined his aim, the author marshals all of the resources of his unrivaled exegetical skill in subjecting the Charter to as devastating a criticism as, probably, any legal document has ever received. No obscurity, no inconsistency, and no ambiguity are left unexposed. Some of Professor Kelsen's distinctions may seem over-refined, and to illustrate, in the words of one critic, a "pessimistic tendency to extract the largest possible element of absurdity from an admittedly imperfect document." This is notably true of his discussion of Article 2 (7) of the Charter, in which he advances, as an admissible interpretation, the view that the obligation of Members under Article 2 (4) to refrain from the threat or use of force in their "international relations" seems not to apply to a case where the dispute arises out of a matter within the domestic jurisdiction of one of the parties (pp. 779-780). A like comment might be made concerning his argument that a party to a dispute before the International Court of Justice, in spite of its declaration accepting as "compulsory" the jurisdiction of the Court in "legal" disputes, and in spite of the fact that the dispute concerns one of the subjects enumerated in clauses (a) to (d) of Article 36 (2) of the Statute, may withdraw such dispute from the competence of the Court by declaring it to be of a political nature (pp. 481-482).

Professor Kelsen emphasizes that the view that the verbal expression of a legal norm has only one "true" meaning, to be discovered by correct interpretation, is "a fiction, designed to maintain the illusion of legal security." It is, he asserts, frequently impossible to discover an effective common intention in the provisions of an instrument which is the product of a complex procedure involving many varying and even conflicting wills (p. xiv). It is true that legal norms as expressed in words have frequently more than one possible meaning. But where several meanings are discoverable by the process of logical-grammatical interpretation, which is the

method employed almost exclusively by the author, is it not permissible for the jurist to employ other, and equally "juristic," methods for the purpose of resolving the contradiction to which the first method leads? Is it not, as Judge Anzilotti has stated, "a fundamental rule in the interpretation of legal texts" that "when there are two interpretations, one of them attributing a reasonable meaning to each part of the text and the other not fulfilling these conditions, the first must be preferred" (Publications of the P.C.I.J., Series A/B, No. 41, p. 52)? The intention of the framers of the Charter was often unclear and sometimes was purposely left so; but where there is doubt as to their meaning it is surely legitimate to have recourse to the principle of effectiveness, and to interpret the provision at issue by reference to the purpose of the Charter as a whole.

Professor Kelsen has himself indicated a somewhat broader approach to the problem of interpreting an international constitutional instrument in his earlier study on "Legal Technique in International Law: A Textual Critique of the League Covenant," *Geneva Studies*, Vol. X, No. 6, Dec. 1939, esp. pp. 7-24. The present work, while making use of the *travaux préparatoires* and the practice of the United Nations, does not appear to exhaust the possibilities of the historical method and the rule of *contemporanea expositio* as means for resolving the logical difficulties conjured up by application of the grammatical method.

It may be replied that only authentic interpretation by a qualified organ of the United Nations has a binding effect, and that, as the author observes, "any other interpretation of a legal norm is an intellectual activity which may have great influence on the law-creating and law-applying function, but has no legal importance in itself" (p. xv). A critical analysis, by "showing the legislator how far his product lags behind the goal of any law-making function, i.e., the unambiguous regulation of inter-individual or inter-state relations, may induce him to improve his technique" (p. xvi). Professor Kelsen has amply demonstrated the technical shortcomings of the drafters of the Charter, but he modestly underestimates the importance and influence of "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

The Law of the United Nations is fully documented with reference to the Charter and the Statute, their *travaux préparatoires*, and the discussions and decisions of the various organs of the United Nations. It is understandable that limitations of space should have prevented reference to any secondary sources.

Professor Kelsen has produced a remarkable work of permanent value. Future commentaries (and, we hope, future editions of the present volume) will necessarily take account of the developing practice of the United

Nations, but we venture that this will remain the definitive treatise upon the legal meaning of the Charter.

LAWRENCE PREUSS

The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations. By Sir W. Eric Beckett. London: Stevens & Sons, Ltd., 1950. pp. viii, 76. Appendices, Index. 10 s. 6 d.

The Legal Adviser to the British Foreign Office has published herewith the substance of an address delivered before the International Law Association on May 11, 1949. Some passages have been added to the original address in the light of later Parliamentary debates on the North Atlantic Treaty in Great Britain and before the Senate of the United States.

The author undertakes to consider only the legal aspects of the Treaty, although he well recognizes the important controversial political issues involved. In doing this he has been able within brief compass to throw much light upon the relationship of the North Atlantic Treaty to the provisions of the Charter of the United Nations with reference to the terms "preventive and enforcement action" and "individual or collective self-defense" as found in the Charter. The author does not regard the Treaty as a "regional arrangement" under Chapter VIII of the Charter, although it may contain provisions suitable as a basis for regional arrangements. The Senate Foreign Relations Committee also refused to characterize it as exclusively regional but as primarily a "collective defense arrangement."

Sir Eric recognizes the real danger to be that, in case of conflict likely to endanger the peace and security of the world, the five permanent members of the Security Council may not concur in any decision, thus leaving the Council powerless to discharge its primary responsibility. It is in this period before the Council has acted that collective defense measures may be taken without any prior authority from the Council (p. 15). This situation was envisaged quite early by France and Great Britain with respect to possible aggression by Germany, and this resulted in the Treaty of Dunkirk of March 4, 1947, which assumes to provide for collective action under Article 51 of the Charter. Such treaties, says the author, "may be said to mark a transitional stage between two periods, between the midsummer night's dream of San Francisco on the one hand and the calm, clear acceptance of realities of the present day" (p. 18). It does not require much of the reader's imagination to apply some of the author's discussion to the *impasse* in the Security Council with reference to Korea.

The appendices of this useful and timely essay contain texts taken from the Charter, the texts of the Treaty of Dunkirk, the Inter-American Treaty

of Reciprocal Assistance, the Brussels Treaty, the North Atlantic Treaty, and the Anglo-Soviet Alliance of 1942.

ARTHUR K. KUHN

A Decade of American Foreign Policy. Basic Documents, 1941-49. (United States Senate Doc. No. 123, 81st Cong., 1st Sess.) Washington: Government Printing Office, 1950. pp. xiv, 1382. Index. \$2.75.

Revision of the United Nations Charter. United States Senate, Committee on Foreign Relations, Subcommittee on Revision of the United Nations Charter, *Hearings*. Washington: Government Printing Office, 1950. pp. vi, 808. \$1.75.

Needless to say, these two volumes constitute altogether exceptional mines of information for students and teachers of United States foreign policy and international organization.

The first volume contains 313 documents ranging from the Four Freedoms, of January 6, 1941, to Point Four documents at the end of 1949. The documents are arranged by eight main topics and many sub-topics. This involved an enormous amount of work in which both Department of State personnel and the research staff of the Senate Foreign Relations Committee participated. In the parts dealing with the United Nations and the Inter-American system complete texts of the Charters of the UN and the OAS and of the constitutions of specialized agencies are reproduced. In other sections more highly political documents appear, including utterances of the President, Secretary of State, diplomatic representatives, and Congressmen.

The Hearings on Revision of the UN Charter are also very carefully arranged so that testimony is grouped according to the various resolutions which have been introduced in the Senate for revision of the Charter or establishment of more advanced forms of world organization. Testimony was given, of course, by many experts and proponents of the various measures and much testimony was received in written form. There was also, as usual, quite a good deal of discussion or cross-examination of witnesses, so to speak. In the course of the hearings most of the central problems of international organization and world government came in for considerable attention. Again the staff of the Senate Committee contributed greatly to make this fine collection of material what it is.

It is to be hoped that more publications of this type will be issued. Perhaps the volumes could be kept down slightly in mass or volume in the interests both of physical handling and psychological effect.

PITMAN B. POTTER

Le Organizzazioni Internazionali. By Francisco Florio. Milan: A. Giuffrè, 1949. pp. x, 156. Index. L. 550.

This is an excellent study on international organizations revealing the typical virtues of the Italian school of international law: theoretical, sys-

tematic, strictly legal treatment, use of the whole literature in all languages. These international organizations are defined by the author as a type of unions of states with certain characteristics. They have their legal source immediately in a particular international legal order, derive from the legal order of the community of states, are organized, permanent, have a tendency toward universality; have autonomous and permanent organs, so that their legal acts are directly imputed to them, not to the member states. They do not form a super-state, but they exist independent of the states. They form a new category of subjects in international law. The author, therefore, excludes from his concept of international organizations non-permanent (*e.g.*, the IRO), regional (*e.g.*, the OAS) organizations, as well as international administrative unions. The present-day examples of his concept of international organizations are the United Nations, the International Court of Justice and the specialized agencies of the United Nations. The latter he characterizes, with a terminology created by Italian writers, "International Institutes." He shows what they have structurally in common, and, at the same time, their great variety in detail. They are brought into relation with, but not subordinated to the United Nations. The International Court of Justice is for the author also an "Institute," for it is autonomous and its acts must be imputed to a wider, abstract union of states, containing the Members of the United Nations and other states (*e.g.*, Switzerland).

The most original thesis of the author's analysis of the United Nations is his statement that the Security Council can be regarded as an organ of the United Nations only when performing acts where the veto does not apply. In all questions where the veto applies the Security Council must be considered as an organ of the five permanent members plus two representatives of the United Nations. We have, therefore, here a different organ, to which the United Nations has constitutionally delegated certain far-reaching competence. The same applies to the auxiliary organs of the Security Council. The fact that the Security Council is the organ of an alliance of Great Powers makes it naturally subject to the political vicissitudes of all alliances. Whereas the specialized agencies have an international personality only in a particular international legal order, the United Nations has an international personality in general international law: it concludes treaties with non-member states (*e.g.*, Switzerland); administers trust territories; and, through Article 2, paragraph 6 of the Charter, this particular international legal order pretends to identify itself with general international law.

The author also makes voting by majority a necessary prerequisite of an international organization in his sense. Under a unanimity rule, he feels, one cannot speak of an international organ to which the act is imputed, but merely of a "meeting of agents of the Member States." This notion,

frequent among Italian writers, is not tenable. Certainly the Assembly of the League of Nations was an organ of the League even when voting under the unanimity rule.

It seems to this writer that the primary distinction runs between an international organ which can make directly binding decisions and one which can make mere recommendations. In the latter case there is no diminution of national sovereignty, even if voting is by majority. In the first case we must distinguish between decisions *pro foro interno*—here we have real international legislation, but of a hierarchically lower grade—and decisions directly binding upon the Member States. In the last case the voting can be by unanimity or by majority. Only under the last hypothesis does there exist a real diminution of national sovereignty.

The author states correctly that international law is at this time in a stage of transformation. Two opposite tendencies, a centralizing and a particularistic one, struggle with each other. Maybe the international organizations will bring about a new equilibrium, standing, so to speak, halfway between the "classic" international law and "world government" by substituting a system of competence *ratione materiae* for the traditional system of the territorial competence of the sovereign states.

JOSEF L. KUNZ

The Most-Favored-Nation Clause. An Analysis with Particular Reference to Recent Treaty Practice and Tariffs. By Richard Carlton Snyder. New York: King's Crown Press, 1948. pp. xi, 264.

This monograph was timely when it appeared two years ago. Notice and reminder of it are even more timely today. Post-war reaction to the type of commercial policy in the international development of which the United States Government has for nearly two decades taken bold and energetic leadership is being subjected to increasingly aggressive criticism emanating from interests which opposed its adoption and have struggled against its continuance. Though describing his work as "an introductory analysis," Professor Snyder has in fact contributed to current intelligence an exceedingly thorough treatment of the doctrine and practice of equality in international economy during the period between the two world wars. That doctrine and the accompanying policy of forthright reduction of barriers to trade comprise the twin pillars of the arch on which the statesmanship of Cordell Hull constructed the international commercial policy of the United States, now accepted by a large proportion of the world not only through bipartite trade agreements but through the General Agreement on Tariffs and Trade (Geneva, 1947; extended, Annecy, 1949) and the pending Charter of the International Trade Organization (signed at Havana, 1948), projected as a specialized agency of the United Nations.

The legal basis of equality is the most-favored-nation clause in treaties. Examination of hundreds of such treaties is evidenced by the citations to the *League of Nations Treaty Series* (LNTS) which dot the footnotes and bespeak the author's realistic approach to his task. The wealth of detail on most phases of his subject indicates the completeness with which he has fulfilled it. These characteristics, though making the book hard reading for one not possessed of vivid interest in preserving a commercial policy based on equality, add to its value for the serious student and for workers in the Department of State, the Tariff Commission, and other governmental agencies concerned with the administration of the Trade Agreements Act and the implementation of its policy.

The author states his intention of preparing a sequel devoted to the historical development of the most-favored-nation clause. Already, however, he has set forth considerable historical material, while mentioning its original appearance in treaties and discussing its nature, scope, interpretation, and definition, along with its limitations and the exceptions to its operation which parties to treaties have demanded. The chapters on evaluation and criticism indicate clearly the close relationship between an effective policy of equality and the general world economic situation. A useful future for the most-favored-nation clause seems within the range of the clearly probable.

WALLACE MCCLURE

Constitutions of Nations. By Amos J. Peaslee. Concord, N. H.: Rumford Press, 1950. Vol. I: pp. xxiv, 808; Vol. II: pp. x, 824; Vol. III: pp. viii, 840. Appendix. Index. \$22.50.

As stated on the title page, these three handsome volumes constitute "The first compilation in the English language of the texts of the constitutions of the various nations of the world, together with summaries, annotations, bibliographies, and comparative tables." Previous compilations are noted by Mr. Peaslee in his foreword. The general plan of the volumes was submitted to a group of authorities in constitutional and international law for their criticisms and suggestions before publication. Generous acknowledgment of their help is made by Mr. Peaslee.

An introduction by Dr. Ivan Kerno, Assistant Secretary General in charge of the Legal Department of the United Nations, very properly assesses the collection as an important contribution to the essential understanding of the different legal systems and the fundamental constitutional principles of government by the peoples and representatives of the governments who are associated together under the Charter of the United Nations. Dr. Kerno discloses that the necessity for such a compilation was so evident that a project to be undertaken by the United Nations itself was in fact

discussed. By his private initiative Mr. Peaslee has met this international need.

The texts reprinted are from official sources and the translations used are the most reliable available, many obtained through official channels. In some instances translations had to be specially provided. Each constitution is preceded by a summary showing the international status of the government, the source of sovereign power and rights of the people, the several departments into which the government is divided, and statistics as to area, population, and language. Following each constitution is a bibliography of sources used in compiling the texts and annotations. The information contained in these summaries is tabulated in eight comparative tables at the end of the texts in the third volume. An appendix in Volume III gives the texts of draft constitutions not in force at the time of going to press, data regarding other states whose status was uncertain, and notes on national coats-of-arms. An index completes this monumental work.

Everyone who has a serious interest in international affairs from the point of view of comparative constitutional law should have these volumes for ready reference in his library. They are a "must" for statesmen, government officials, international representatives and educators who deal with this subject. In preparing and publishing them, Mr. Peaslee has rendered an invaluable national and international public service.

GEORGE A. FINCH,
Editor-in-Chief

NOTES

Guerra e Direito Internacional. By A. C. Raja Gabaglia. São Paulo: Saraiva S. A., 1949. pp. viii, 638. Index. \$6.00. Commander Raja Gabaglia of the Brazilian Navy, instructor in international law at the Brazilian Naval War College at Rio de Janeiro, has written this book in the realistic conviction that war exists and that it is, therefore, everybody's duty to disseminate the texts of the laws and rules of war. The book does not want to defend this or that doctrine, but rather to hold a balance between the classical principles of international law and ideas of reform, often not adjusted to realities. An international police force may be a grandiose idea, but it has as yet no existence in reality.

The author investigates in detail the reasons for the actual negation of, and hostility toward, the laws of war. In his discussion of the principal problems of the laws of war he shows the actual chaotic state of the laws of war; revision was already urgent in 1914 and more so after World War I. But as nothing was done, many problems arose in World War II for which there was no juridical answer at all. Wholesale violations of existing laws of war often make impossible the answer as to what is the law of war actually in force today.

The book gives a full survey of municipal legislation on the laws of war and on the international law of war. Its most original and most extensive part consists in a compilation of all documentary texts, municipal and international, with regard to every detailed problem of the laws of war,

arranged in alphabetical order. The book contains an abundant bibliography. Of particular value is the fact that the text of the four new Geneva Conventions of 1949 for the protection of the victims of war is already fully worked in.

JOSEF L. KUNZ

The Minimum Standard of International Law Applied to Aliens. By Andreas H. Roth. Leiden: A. W. Sijthoff, 1950. pp. 194. Index. Fl. 7.50. Non-conformance to the minimum standard of treatment of aliens by states constitutes an international delinquency, says Dr. Roth; and the purpose of the book is to examine this standard. Part I is devoted to theory, Part II to application. He studies the position of the alien in some detail and builds cautiously by slow steps up to the two theories of "National Treatment" (pp. 63-80) and "Minimum Standard" (pp. 81-111). He finds the evidence in support of each about equal, but after careful analysis arrives at a support of the latter. In Part II he attempts to pin down the vague "international standard" in definite rules, of which he lists eight. The logical presentation is careful, even pedantic. Little that is new is added, but the analysis is helpful.

CLYDE EAGLETON

La Communauté Internationale et ses Institutions. By Maxence Bibié. Paris: Recueil Sirey, 1949. pp. 248. Appendices. Index. Fr. 480. This *manuel* by a distinguished scholar from the University of Bordeaux has successfully attained the author's modest objective, which, in his own words, is "merely to give an over-all picture of the long and difficult evolution leading up to the present results, still so imperfect," accomplished by the "legal international institutions." Hence the book will serve as an excellent textbook for beginners, especially among students in France. A valuable feature of the volume is the appendix, containing nine basic documents in the field of international organization, from the statute of the Permanent Court of Arbitration to that of the Council of Europe.

JOHN B. WHITTON

Le Statut International de Trieste. By Jacques Leprette. Paris: A. Pedone, 1949. pp. viii, 230. This is a comprehensive legal study on the Free Territory of Trieste. The elements of the regional Italo-Yugoslav controversy (history, population, geographical and economic situation), the interest of Central Europe, and the fact that Trieste became a focal point in the "cold war" are all carefully studied. The full history of the case, from the establishment of the "Morgan Line" in 1945 through the elaboration of the texts to the failure to put the Statute into force, are given. The author makes a full legal analysis of the provisional and permanent régime of Trieste, of the relations between the Statute and the Trieste Constitution, of the international and local organs (Security Council and Governor), of the monetary and customs régime, of the Free Port and its organization.

Having compared the Free Territory with all previous experiments, the author comes to the same conclusion as did this reviewer in his study of the matter (*Western Political Quarterly*, Vol. I, No. 2 (June 1948), pp. 99-112). The Free Territory is an innovation in international law: not sovereign, not a state, yet an independent person in international law;

not connected with any other national legal order, but directly subordinated to the Security Council. It is an excellent example of the fact that even non-sovereign local communities may have an international personality.

But whereas others see in the Free Territory merely another experiment, stemming from the "international frontier," the author sees in this Free Territory, in independence without sovereignty, a new stage in evolution, a step toward the transformation of the concept of a state. Accordingly it matters not that the Free Territory may never come into force. Trieste was only the environment in which a new concept was born; it is, therefore, *plus justement une anticipation, qu'une anomalie*.

Organização dos Estados Americanos. By Isidoro Zanotti. Rio de Janeiro: Imprensa Nacional, 1948. pp. 104. This small publication contains in its first thirty pages some information on the general factors underlying Pan Americanism and on the ideas of Bolívar and his successors, as well as on the Pan American Conferences since 1899. Primarily it gives an exposition of the new organization under the Charter of Bogotá and the other treaties and resolutions adopted at the Bogotá Conference. It treats briefly of the principles, the organs, and the present list of inter-American specialized agencies, with particular reference to their economic aspect. The author, an enthusiastic adherent of the Pan American system, does not attempt to give a scientific investigation; his aim is the furthering of a better understanding of Pan America through an effort toward popularizing the Organization of American States.

The Evolution of Our Latin-American Policy. A Documentary Record. Edited by James W. Gantenbein. New York: Columbia University Press, 1950. pp. xxviii, 980. Appendices. Index. \$12.50. In this work the editor presents in one volume the principal documents concerning our policy toward Latin America from Washington's Farewell Address to the Charter of Bogotá. The documents, mostly addresses, messages, and statements by American statesmen are arranged in several groups: relations with Latin America, especially birth and development of Pan Americanism; the Monroe Doctrine and its development; the problems of Cuba, Panama Canal, Mexico, Nicaragua, Haiti, and Santo Domingo. The appendix gives under the same groupings the texts of relevant treaties and of the most important resolutions of Pan American Conferences from 1889 to 1948. This is an objective collection of documents; the author has "no theory or principle to prove or explain and has no purpose of presenting either propaganda or criticism with respect to any period." As the work brings hundreds of documents, taken from many sources, conveniently within the covers of one volume, it constitutes an excellent tool for teaching; it is also valuable for the general reader, for the historian, and for the international lawyer, particularly for the specialist in inter-American relations.

Compte Rendu de la XXXVIII^e Conférence de l'Union Interparlementaire. Geneva: Bureau Interparlementaire, 1949. pp. xii, 848. Annexes. Index. The volume under review, well printed and presented, gives the report of the Thirty-eighth Interparliamentary Conference, held at Stockholm from September 7 to September 12, 1949. Representatives or observers from twenty-nine states and from the United Nations and the International Labor Organization were present. The documents are printed in English and French.

The Report of the Swiss Secretary General, Leopold Boissier (English text pp. 148-250), is an excellent, lucid, comprehensive, and impartial survey of the whole world situation during the year preceding the Conference. The report, exactly because of its objectivity, makes rather sad reading. The world is divided; the hopes born out of joint struggle and victory have not been fulfilled; everywhere pessimism and mistrust are to be found; the ideological struggle is more intense than ever. Indeed no state of the "People's Democracies" was present, except Yugoslavia.

It is, of course, not possible to enter here into the details of the discussions which centered upon the Report of the Secretary General and on three resolutions. Among them those on "unequal treaties" and on the "defense and consolidation of peace" are particularly interesting to the international lawyer. We find here strong statements of national grievances and discussions on a more general level. A French speaker criticized the policy of neutrality, but Undén (Sweden) and Rusca (Switzerland) strongly defended it. Some speeches are on strictly legal lines, others appeal to emotions. It is often a literary pleasure to read the highly polished speeches in an elegant French. But the outcome, the resolutions adopted, are very modest. This feeling was voiced by some speakers. L'Abbé Pierre (France) refused to vote for the resolution on "unequal treaties" carrying a wish that the beneficiaries of such treaties will consent to their revision, as being "once more a Platonic text, evoking a semblance of action, but not containing the slightest positive act." Boerlin (Switzerland), standing for the primacy of law, exclaimed: "There are too many congresses, too many beautiful words which legally bind no one, and too few solutions in the world; and only real solutions count in the life of nations."

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[Abbreviations: *ASIL*, American Society of International Law; *BR*, Book Review; *BN*, Book Note; *CN*, Current Note; *Ed*, Editorial Comment; *JD*, Judicial Decision; *LA*, Leading Article; *LN*, Notes on Legal Questions concerning the United Nations]

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UNITED NATIONS
REPORT OF THE INTERNATIONAL LAW COMMISSION
COVERING ITS SECOND SESSION, JUNE 5-JULY 29, 1950¹

PART I: GENERAL

CHAPTER I

Introduction

ORGANIZATION OF THE SECOND SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947 and in accordance with the Statute of the Commission annexed thereto, held its second session at Geneva, Switzerland, from 5 June to 29 July 1950.

2. The Commission consists of the following members:

<i>Name</i>	<i>Nationality</i>
Mr. Ricardo J. Alfaro	Panama
Mr. Gilberto Amado	Brazil
Mr. James Leslie Brierly	United Kingdom
Mr. Roberto Córdova	Mexico
Mr. J. P. A. François	Netherlands
Mr. Shuhsi Hsu	China
Mr. Manley O. Hudson	United States of America
Faris Bey el-Khoury	Syria
Mr. Vladimir M. Koretsky	Union of Soviet Socialist Republics
Sir Benegal Narsing Rau	India
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Jean Spiropoulos	Greece
Mr. J. M. Yepes	Colombia
Mr. Jaroslav Zourek	Czechoslovakia

3. With the exception of Sir Bengal Narsing Rau and Mr. Jaroslav Zourek who were unable to attend, all the members of the Commission were present at the second session. Mr. Vladimir M. Koretsky withdrew at the opening meeting, as related in paragraphs 4-7 below.

4. At the opening meeting on 5 June 1950, under the chairmanship of Mr. Manley O. Hudson, Mr. Koretsky objected to the presence in the Com-

¹ U. N. General Assembly, Official Records, 5th Sess., Supp. No. 12 (A/1316).

mission of Mr. Shuhsi Hsu. He stated: "All the members of the Commission had been nominated by their Governments and should represent a particular legal system, so that all the main legal systems in the world would be represented in the Commission. Mr. Shuhsi Hsu had been elected following nomination by the former Kuomintang Government which he thus represented, and hence he had clearly ceased to represent the Chinese legal system." Mr. Koretsky therefore called upon the Commission "to stop Mr. Shuhsi Hsu from taking part in its work and, in accordance with article 11 of its Statute, to elect a representative of the legal system of the Chinese People's Republic." He further declared that if his proposal were not accepted, he would take no further part in the work of the Commission; moreover, any decisions taken by the Commission with the participation of Mr. Hsu "could not be regarded as valid."

5. The Chairman ruled the proposal of Mr. Koretsky out of order. He declared: "The members of the Commission were elected in 1948 to serve for three years. They do not represent States or Governments; instead, they serve in a personal capacity as persons of 'recognized competence in international law' (article 2 of the Statute). Being a creation of the General Assembly, the Commission is not competent to challenge the latter's application of article 8 of the Statute [relating to the election of the members]. Nor can it declare a 'casual vacancy' under article 11 in these circumstances. Mr. Koretsky's proposal is therefore out of order."

6. Several members spoke in support of the ruling of the Chair. They emphasized that members of the Commission were elected by the General Assembly on a personal basis and did not represent Governments. Only the General Assembly could lay down the conditions for the election of members of the Commission. The Commission had no competence to do so.

7. Mr. Koretsky appealed against the ruling of the Chair. By a vote of 10 to 1, the Commission decided to uphold the ruling. Mr. Koretsky thereupon withdrew from the meeting.

At a subsequent meeting, Mr. J. P. A. François, who was absent at the opening meeting, declared that, had he been present, he would have supported the ruling of the Chair.

8. The Commission elected, for a term of one year, the following officers:

Chairman: Mr. Georges Scelle;
First Vice-Chairman: Mr. A. E. F. Sandström;
Second Vice-Chairman: Faris Bey el-Khoury;
Rapporteur: Mr. Ricardo J. Alfaro.

9. Mr. Ivan S. Kerno, Assistant Secretary-General for Legal Affairs, represented the Secretary-General. Mr. Yuen-li Liang, Director of the Division for the Development and Codification of International Law, acted as Secretary of the Commission.

10. The Secretariat, besides servicing the Commission, placed before the latter a number of memoranda and other documents¹ relating to the several subjects under consideration.

AGENDA

11. The Commission considered a provisional agenda for the second session prepared by the Secretariat (A/CN.4/21), consisting of the following items:

(1) (a) General Assembly resolution 373(IV) of 6 December 1949: approval of Part I of the Report of the International Law Commission covering its first session.

(b) General Assembly resolution 375(IV) of 6 December 1949; draft Declaration on Right and Duties of States.

(2) General Assembly resolution 374(IV) of 6 December 1949: recommendation to the International Law Commission to include the regime of territorial waters in its list of topics to be given priority.

(3) (a) Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: report by Mr. Spiropoulos.

(b) Preparation of a draft code of offences against the peace and security of mankind: preliminary report by Mr. Spiropoulos (General Assembly resolution 177(II) of 21 November 1947).

(4) Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide and other crimes over

¹ These include the following:

(i) Article 24 of the Statute of the International Law Commission: Memorandum on the Working Paper of Mr. Hudson (A/CN.4/27).

(ii) Regime of the High Seas: Questions under Study by other Organs of the United Nations or by Specialized Agencies (A/CN.4/30).

(iii) Bibliography on the Regime of the High Seas (A/CN.4/26).

(iv) Bibliography on International Criminal Law and International Criminal Courts (A/CN.4/28).

(v) Bibliography on Arbitral Procedure (A/CN.4/29).

(vi) Bibliography on the Law of Treaties (A/CN.4/31).

The following memoranda were also submitted to the special rapporteurs for their reference and were subsequently made available to the members of the Commission:

(i) Memorandum on the Soviet Doctrine and Practice with Respect to Arbitral Procedure.

(ii) Memorandum on the Soviet Doctrine and Practice with Respect to the Regime of the High Seas.

(iii) Memorandum on the Soviet Doctrine and Practice with Respect to the Law of Treaties.

(iv) Memorandum on Arbitral Procedure.

(v) Memorandum on the Regime of the High Seas.

(vi) Memorandum on the Draft Code of Offences against the Peace and Security of Mankind.

which jurisdiction will be conferred upon that organ by international conventions: working papers by Messrs. Alfaro and Sandström (General Assembly resolution 260 B(III) of December 1948).

(5) Law of treaties: preliminary report by Mr. Brierly.

(6) Arbitral procedure: preliminary report by Mr. Scelle.

(7) Regime of the high seas: preliminary report by Mr. François.

(8) Ways and means for making the evidence of customary international law more readily available: working paper by Mr. Hudson (Article 24 of the Statute of the International Law Commission).

(9) The right of asylum: working paper by Mr. Yepes.

(10) Co-operation with other bodies:

(a) Consultation with organs of the United Nations and with international and national organizations, official and non-official.

(b) List of national and international organizations prepared by the Secretary-General for the purpose of distributing documents (Articles 25 and 26 of the Statute of the International Law Commission).²

(11) Date and place of the third session.

12. At its first session, the Commission invited Mr. M. Yepes to prepare a working paper on the topic of the right of asylum for its consideration. At the beginning of the second session, Mr. Yepes stated that, in view of the fact that a case involving the right of asylum was pending before the International Court of Justice, he would, for the time being, postpone the submission of his working paper which had already been prepared. The Commission accordingly decided not to include the topic of the right of asylum in the agenda of its second session. As regards the item of "Co-operation with other bodies," the Commission did not find it necessary to consider the item separately at the present session, since no independent question arose in that connexion.

ITEMS ON WHICH THE COMMISSION HAS COMPLETED ITS STUDY

13. In the course of its second session the Commission held forty-three meetings. It completed its study on the following items:

(1) Ways and means for making the evidence of customary international law more readily available;

(2) Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal;

(3) Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions.

² Revised provisional list prepared by the Secretary-General (A/CN.4/24).

14. The reports on these three items are contained respectively in Parts II, III and IV of the present document. These are submitted to the General Assembly for its consideration.

ITEMS ON WHICH THE COMMISSION WILL CONTINUE ITS STUDY

15. The Commission undertook a preliminary discussion on the reports presented by the special rapporteurs on the following items:

- (1) Preparation of a draft code of offences against the peace and security of mankind;
- (2) Law of treaties;
- (3) Regime of the high seas;
- (4) Arbitral procedure.

16. The progress in the work done by the Commission on the foregoing four items is related in Parts V and VI of the present document for the information of the General Assembly. The Commission will in due course submit its reports on these subjects for the consideration of the General Assembly, in accordance with the provisions of the Statute of the Commission.

CHAPTER II

Miscellaneous Decisions

GENERAL ASSEMBLY RESOLUTIONS ON THE REPORT OF THE COMMISSION
COVERING ITS FIRST SESSION

17. The General Assembly, at its fourth session, adopted resolutions 373(IV) and 375(IV), both on the report of the International Law Commission covering its first session. The Commission took note of these resolutions.

RECOMMENDATION OF THE GENERAL ASSEMBLY RELATIVE TO THE TOPIC OF
THE REGIME OF TERRITORIAL WATERS

18. The Commission further gave consideration to General Assembly resolution 374(IV) in which the General Assembly recommended to the International Law Commission that it include the topic of the regime of territorial waters in its list of priority topics selected for codification. In response to this request, the Commission decided to include in its list of priorities the topic of territorial waters.

REQUEST OF THE ECONOMIC AND SOCIAL COUNCIL RELATIVE TO A DRAFT
CONVENTION ON THE NATIONALITY OF MARRIED WOMEN

19. By a letter of 18 July 1950 (A/CN.4/33), the Secretary-General transmitted to the Commission the following resolution adopted on 17 July 1950 by the Economic and Social Council:

"The Economic and Social Council,

"Noting the recommendation of the Commission on the Status of Women (fourth session) in regard to the nationality of married women (Document E/1712, paragraph 37),

"Noting further that the International Law Commission, at its first session, included among the topics selected for study and codification 'nationality, including statelessness,'

"Proposes to the International Law Commission that it undertake as soon as possible the drafting of a convention to embody the principles recommended by the Commission on the Status of Women,

"Requests the International Law Commission to determine at its present session whether it deems it appropriate to proceed with this proposal and, if so, to inform the Economic and Social Council as to the appropriate time when the International Law Commission might proceed to initiate action on this problem; and

"Invites the Secretary-General to transmit this resolution to the International Law Commission together with the recommendation of the Commission on the Status of Women."

20. After consideration, the Commission adopted the following decision:

"The International Law Commission

"Deems it appropriate to entertain the proposal of the Economic and Social Council in connexion with its contemplated work on the subject of 'nationality, including statelessness,'

"Proposes to initiate that work as soon as possible."

It was understood that the Commission might initiate work on the subject at its session in 1951, if it be found possible to do so.

EMOLUMENTS FOR MEMBERS OF THE COMMISSION

21. In its report on the first session, the Commission suggested that the General Assembly might wish to reconsider the terms of Article 13 of the Statute concerning the allowance paid to the members of the Commission, in order to make service in the Commission less onerous financially. The Commission remains convinced that such a reconsideration is necessary for the sake of the future efficiency of its work.

DATE AND PLACE OF THE THIRD SESSION

22. The Commission decided, after consultation with the Secretary-General, that it would hold its third session in Geneva, Switzerland. This session, which will last not longer than twelve weeks, will begin in May, 1951, the exact date being left to the discretion of the Secretary-General in consultation with the Chairman of the Commission.

ACKNOWLEDGMENT OF THE WORK OF THE SECRETARIAT

23. The Commission wishes to acknowledge the important collaboration of the Secretary-General and the Legal Department of the Secretariat in its work, and expresses its appreciation for the numerous memoranda and documents placed at the disposal of the Commission and for the valuable assistance afforded to it.

PART II: WAYS AND MEANS
FOR MAKING THE EVIDENCE OF CUSTOMARY INTERNATIONAL LAW MORE READILY AVAILABLE

1. INTRODUCTION

24. Article 24 of the Statute of the International Law Commission provides:

The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

La Commission examine les moyens susceptibles de rendre plus accessible la documentation relative au droit international coutumier, par exemple la compilation et la publication de documents établissant la pratique des Etats et des décisions de juridiction nationales et internationales sur des questions de droit international, et elle fait rapport à l'Assemblée générale sur ce sujet.

25. The history of the drafting of this text was set forth in the memorandum placed before the Commission at its first session by the Secretary-General of the United Nations (A/CN.4/6, pages 3-5). The Commission also had before it at its first session a working paper prepared by the Secretariat, based on the memorandum (A/CN.4/W.9). The question of the implementation of Article 24 was considered by the Commission at its 31st and 32nd meetings. At the conclusion of the discussion, the Commission invited Mr. Manley O. Hudson to prepare a working paper on the subject, to be submitted to the Commission at its second session.

26. This working paper (A/CN.4/16 and A/CN.4/16/Add.1) was studied by the Commission during its second session at its 40th meeting. The results of this study are shown in the following paragraphs which are based on the contents of the working paper as harmonized with views expressed by the majority of the Commission.

27. The task assigned to the Commission was to consider and to report to the General Assembly on ways and means (*moyens*) for making the

evidence (*documentation*) of customary international law more readily available (*plus accessible*). Two sources of customary international law are referred to in Article 24: State practice, and decisions of national and international courts on questions of international law. The Commission was directed to consider (*par exemple*) such ways and means as the collection and publication of documents concerning these sources. The text of Article 24 does not preclude consideration of other ways and means, nor does it exclude other sources.

2. SCOPE OF CUSTOMARY INTERNATIONAL LAW

28. Article 24 of the Statute of the Commission refers only to "customary international law" (*droit international coutumier*). Its emphasis is in line with the traditional distinction between customary international law and conventional international law. That distinction was followed in 1920 in the drafting of Article 38 of the Statute of the Permanent Court of International Justice, the integrity of which is preserved in Article 38 of the Statute of the International Court of Justice, as revised in 1945. The Court is directed to "apply" four categories of sources of law, *i.e.*, to resort to them in finding the law applicable to the case before it. Though the fourth category is denominated "subsidiary," Article 38 does not otherwise establish a general hierarchy among the following:

- (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) International custom, as evidence of a general practice accepted as law;
- (c) The general principles of law recognized by civilized nations;
- (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

29. Perhaps the differentiation between conventional international law and customary international law ought not to be too rigidly insisted upon, however. A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law. For present purposes, therefore, the Commission deems it proper to take some account

of the availability of the materials of conventional international law in connexion with its consideration of ways and means for making the evidence of customary international law more readily available.

30. Article 24 of the Statute of the Commission seems to depart from the classification in Article 38 of the Statute of the Court, by including judicial decisions on questions of international law among the evidences of customary international law. The departure may be defended logically, however, for such decisions, particularly those by international courts, may formulate and apply principles and rules of customary international law. Moreover, the practice of a State may be indicated by the decisions of its national courts.

31. Evidence of the practice of States is to be sought in a variety of materials. The reference in Article 24 of the Statute of the Commission to "documents concerning State practice" (*documents établissant la pratique des Etats*) supplies no criteria for judging the nature of such "documents." Nor is it practicable to list all the numerous types of materials which reveal State practice on each of the many problems arising in international relations.

32. Without any intended exclusion, certain rubrics may be listed for convenience. The following paragraphs will serve both as a list of such rubrics, and as a survey of the more important official and non-official collections with reference to each of them. Some of the materials referred to will evidence the formulation of customary or conventional international law, while others will evidence merely the practice of States. Commentaries to be found in treatises and monographs will not be included among the materials listed under the various rubrics.

3. EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

A. Texts of International Instruments

33. Two important collections of the texts of treaties and conventions concluded by various States have long served a useful purpose:

- (a) *British and Foreign State Papers*, published in 140 volumes from 1841 to 1948;
- (b) de Martens, *Nouveau Recueil général de Traités*, published since 1843 in succession to the earlier *recueils* published from 1791: 1st series, twenty volumes; 2nd series, thirty-five volumes; 3rd series, forty volumes, down to 1943.

Mention may also be made of the thirty volumes of Hertslet's *Commercial Treaties*.

34. For present purposes, it is hardly necessary to refer to collections of the texts of earlier instruments, such as the seventeen volumes of Rymer's *Foedera*, and the thirteen volumes of Dumont's *Corps Universel Diplomatique du Droit des Gens*, both published in the eighteenth century.

35. The inauguration of a collection of texts of treaties and conventions to be published under official international auspices was considered at a diplomatic conference held in Berne in 1894, but no agreement was reached. Soon thereafter, however, publications of texts of international instruments in their respective fields were inaugurated by the international unions for the protection of industrial and literary property. In 1911, the International Bureau of the Permanent Court of Arbitration inaugurated the publication of the texts of arbitration treaties communicated to it under Articles 22 and 43 respectively of the Hague Conventions on Pacific Settlement of International Disputes of 1899 and 1907.

36. In 1920, the publication of the texts of treaties registered under Article 18 of the Covenant was begun by the League of Nations. When it was discontinued in 1946, the *League of Nations Treaty Series* consisted of 205 volumes, supplemented by nine volumes of indices. A consolidated index of the whole *Series* would serve a useful purpose.

37. Since 1946, the texts of treaties and agreements registered with, or filed and recorded by, the Secretariat of the United Nations are being published in the *United Nations Treaty Series*, of which thirty-three volumes have appeared up to this time. Index volumes are contemplated for the future.

38. It may be assumed that the texts of most of the treaties concluded since 1920 have been published, or are to be published in either the *League of Nations Treaty Series* or the *United Nations Treaty Series*. For the texts of treaties concluded before 1920, the *British and Foreign State Papers* and de Martens' *Nouveau Recueil général de Traités* are supplemented by various national collections.

39. Many States publish in serial or in collected form the texts of treaties and conventions to which they are parties; in some States, such texts are scattered in publications of various kinds. Collections of the treaties of particular countries are often published privately, also.

The *Manual of Collections of Treaties and of Collections Relating to Treaties*, compiled by Denys P. Myers, and published in 1922, contains 3,468 entries.

40. Several useful *répertoires* of treaties have been published, notably:

- (a) Tétot, *Répertoire des Traités de Paix*, etc., 1493-1866, in two parts; published 1866-1870.
- (b) Ribier, *Répertoire des Traités de Paix*, etc., 1867-1895, two volumes; published 1895-1899.
- (c) Institut intermédiaire international, *Répertoire général des Traités*, 1895-1920; published in 1926.

A Chronology (*Répertoire*) of International Treaties and Legislative Measures was published by the League of Nations Library from 1930 to 1940.

41. Mention may also be made of several collections of treaties, either regional or otherwise special. Extremely useful is the *Collection of Treaties, Engagements and Sanads Relating to India and Neighboring Countries*, edited by C. U. Aitchison, published in five editions since 1862; the fifth edition, published by the Government of India, consists of fourteen volumes. Valuable, also, is Calvo's *Recueil des Traités* of the States of Latin America, 1493-1823, in six volumes, published 1862-1868. A collection of the texts of multipartite international instruments concluded between 1919 and 1945, edited by Hudson, was published in Washington by the Carnegie Endowment for International Peace in nine volumes, under the title *International Legislation*. In 1948, the United Nations published a valuable survey of treaties on pacific settlement.

B. Decisions of International Courts

42. The awards of tribunals of the Permanent Court of Arbitration were published by the International Bureau as they were handed down, but no official collection of them was issued. An unofficial collection of the texts of the awards, with English translations, was compiled by James Brown Scott and published in his *Hague Court Reports* (1916) and *Hague Court Reports*, second series (1932). A volume of *Analyses des Sentences* was published by the International Bureau in 1934. A digest of the awards down to 1928 was published in *Fontes Juris Gentium*, Series A, Sectio I, Tomus 2.

43. Most of the decisions of the Central American Court of Justice were published in the seven volumes of the *Anales de la Corte*, issued from 1911 to 1917. The editing of these volumes left much to be desired, and it seems probable that they are not now generally available. There is need for a new and complete collection of the jurisprudence of this Court.

44. The judgments, advisory opinions and orders of the Permanent Court of International Justice, in French and English, were published in serial form in Series A, Series B and Series A/B of its publications; documents and records of proceedings concerning them were published in Series C; and digests were published in Series E. The English texts of the judgments and opinions were reproduced in the four volumes of Hudson's *World Court Reports*. A German translation of the judgments and opinions down to 1935 was published in the twelve volumes of *Entscheidungen des Ständigen Internationalen Gerichtshofs*. A Spanish translation of the earlier judgments and opinions was published in the two volumes of *Collección de Decisiones del Tribunal Permanente de Justicia Internacional*. A digest of the Court's jurisprudence from 1922 to 1934 was published in *Fontes Juris Gentium*, Series A, Sectio I, Tomus 1 and Tomus 3.

45. The judgments, orders and opinions of the International Court of Justice are published in the annual volumes of *I.C.J. Reports*. Documents and records of the proceedings in each case are published by the Court in

Pleadings, Oral Arguments and Documents; these volumes are not serially numbered. Decisions taken by the Court in application of its Statute and Rules are recorded in the Yearbook published by the Registry.

46. Few of the judgments and awards of the many temporary and *ad hoc* tribunals which have functioned over the past 150 years have been published in systematic form. A useful list of them is to be found in Stuyt's *Survey of International Arbitrations, 1791-1938*. No complete collection of the texts of such judgments and awards has been made.

47. In 1902, La Fontaine published in his *Pasicrisie Internationale* a documentary history of international arbitrations from 1794 to 1900, dealing with 177 cases.

48. Two notable efforts have been inaugurated to compile general collections of international jurisprudence, but both of them were discontinued before completion of the original design. De La Pradelle and Politis edited two volumes of the *Recueil des Arbitrages internationaux*, published in 1905 and 1923, reprinted in 1932; these volumes report and comment on fifty-two cases arising between 1798 and 1872. John Bassett Moore's work on *International Adjudications, Ancient and Modern*, was planned as a comprehensive collection of many volumes; beginning in 1929, six volumes of the *Modern Series* were published, dealing with relatively few cases but in great detail; the one volume of the *Ancient Series*, published in 1936, dealt with a single arbitration.

49. Two collections may be noted of awards in arbitrations to which particular States were parties. Moore's *History and Digest of the International Arbitrations to which the United States Has Been a Party* was published in six volumes in 1898. Van Boetzelaar's volume, *Les Arbitrages néerlandais de 1581 à 1794*, published in 1930, is supplemented by van Hamel's volume, *Les Arbitrages néerlandais de 1813 à nos jours*, published in 1939.

50. The recent inauguration by the United Nations of a series of *Reports of International Arbitral Awards (Recueil des Sentences Arbitrales)* is to be signalized. Three volumes, of continuous pagination, appeared in 1948 and 1949, reporting fifty-nine awards handed down during the period from 1920 to 1941; edited by the staff of the Registry of the International Court of Justice, these volumes were issued as publications of the United Nations. An additional series is now contemplated by the Secretariat of the United Nations.

51. Most of the current international decisions are reported in various periodicals; summaries and digests of them appear in the valuable *Annual Digest and Reports of Public International Law Cases*, published under varying titles since 1932 and now edited by Lauterpacht; the eleven volumes of the *Annual Digest* cover the period from 1919 to 1945. Schwarzenberger's *International Law*, Volume I (2d ed.), is a useful digest of international judicial decisions.

C. Decisions of National Courts

52. Article 24 of the Commission's Statute refers to "the collection and publication . . . of the decisions of national and international courts on questions of international law." The text seems to set off national court decisions from State practice.

53. In general, national courts apply the national law. Their decisions "on questions of international law" are frequently based on international law only insofar as provisions of the latter have been incorporated into the national law. That incorporation is necessarily limited, for many of the provisions of international law serve little purpose in national law; at most, it is only the national view of international law which is incorporated into national law so as to be applicable by national courts. Suits are sometimes brought in the courts of one State by the Government of another State, but as questions of international law, or questions of international concern, more often arise in national courts when no State is represented before the court, decisions may be taken on them without the court's having opportunity to hear the views of any Government. Even where the theory prevails that international law is a part of the national law, a national court may base its decision on principles of international law only in the absence of a controlling national statute or regulation or precedent; for example, in some States which purport to incorporate their treaties into the national law, a statute enacted after the conclusion of a treaty will prevail over the provisions of the treaty itself.

54. It may be concluded that the decisions of the national courts of a State are of value as evidence of that State's practice, even if they do not otherwise serve as evidence of customary international law. The Commission is of the opinion that it is unnecessary to assess the relative value of national court decisions as compared with other types of evidence of customary international law.

55. It would be a herculean task to assemble the decisions, on questions of international law, of the national courts of all States. Assuming that most of such decisions are published in each country, the selection, collection and editing of the texts would involve a great deal of time and a considerable expense.

56. In some of the international law periodicals, reports or digests of national judicial decisions are regularly published. Particular mention should be made in this connexion of the *Journal de Droit International Privé*, founded in 1874 and continued since 1915 as the *Journal de Droit International*, with a total of some seventy-two volumes. Since 1907, the *American Journal of International Law* has regularly published texts of national court decisions.

57. Most valuable in this connexion are the eleven volumes of the *Annual Digest of Public International Law Cases* inaugurated in 1932, covering both national and international jurisprudence for the years since 1919.

Significantly, the term *Reports* has been added to the title of the more recent volumes.

58. A significant collection of decisions of national courts concerning private international law is *Giurisprudenze Comparata di Diritto Internazionale Privato*, published in eight volumes by the Istituto di Studi Legislativi at Rome (1937-1942). In 1925, the International Labour Office inaugurated as an annual publication an *International Survey of Legal Decisions on Labour Law*, of which at least thirteen volumes have been published.

59. Various collections of decisions of prize courts of some countries have been published.

D. National Legislation

60. The term legislation is here employed in a comprehensive sense; it embraces the constitutions of States, the enactments of their legislative organs, and the regulations and declarations promulgated by executive and administrative bodies. No form of regulatory disposition effected by a public authority is excluded.

61. In most States, legislative texts are regularly published in systematic form. The publications in some countries are voluminous and expensive. Obviously, they serve as an important storehouse of evidence of State practice. Yet it seems probable that in many countries the published legislation of other States is not readily available.

62. Several attempts have been made to publish the texts of the constitutions of the various States of the world, but any such collection soon becomes out of date. The most extensive collection is Dareste's *Les Constitutions modernes*, inaugurated in 1883; six volumes of a fourth edition were published in 1928. In 1935 and 1936, a four-volume collection of constitutions of various States was published in Moscow under the auspices of the Government of the Soviet Union. An ambitious collection of *The Constitutions of All Countries* was projected by the Foreign Office of the United Kingdom in 1938, but only one volume containing British Empire constitutions was published. Reference may also be made to the collection of constitutions recently published by Peaslee in three volumes. A tenth edition of a collection of European constitutions edited by Mirkine-Guetzévitch was published in 1938.

63. Several collections of Latin-American constitutions have been made, notably by Altamira (1930), Mirkine-Guetzévitch (1932), Lozano y Mazon (1942), and Pasquel (1943). Fitzgibbon's *Constitutions of the Americas* (1948) contains English texts and translations. Giannini's collection of *Le Costituzioni degli Stati dell' Europa Orientale* appeared in two volumes in 1930. The collection of *Constitutions, Electoral Laws, Treaties of the States in the Near and Middle East* (1947), by Davis, has also served a useful purpose.

64. The *Yearbook on Human Rights* for 1946, published by the United Nations, collects provisions in the constitutions of Members of the United Nations relating to human rights.

65. No attempt has been made to assemble a global collection of the legislation of all States bearing on matters of international concern. An ambitious project was launched by the Istituto di Studi Legislativi of Rome about 1936; its *Legislazione Internazionale* was designed to present texts of or information concerning the laws, decrees, and projects of laws of most of the countries of Europe; the seven volumes published covered the years from 1932 to 1938. Under the same auspices, a *Repertorio della Legislazione Mondiale* was launched in 1933, but only a few volumes were published.

66. Four volumes of an *International Digest of Laws and Ordinances* were published by the International Legislative Information Centre of Geneva in 1938, but the series was not continued.

67. The *Boletín Analítico de los Principales Documentos Parlamentarios Extranjeros*, published in Madrid from 1910 to 1927, was succeeded in 1930 by the *Boletín de Legislación y Documentos Parlamentarios Extranjeros*, of which twelve volumes were published between 1930 and 1935. The French Société de Législation comparée published an *Annuaire de Législation étrangère* from 1872 to 1939.

68. Some attempts have been made to collect and publish the laws of various countries relating to particular topics of international interest. Notable is the *Sammlung Ausserdeutscher Strafgesetzbücher*, of which fifty-four numbers were published between 1881 and 1942. In the early part of the twentieth century, a great collection of the commercial laws of many States was published in four editions in different languages, the English edition consisting of thirty-two volumes. Mention may also be made of the collections of *Nationality Laws, Diplomatic and Consular Laws and Regulations, Neutrality Laws and Regulations, and Piracy Laws*, published by the Harvard Research in International Law. The United Nations Commission on Narcotic Drugs has inaugurated the publication of an *Annual Summary of Laws and Regulations relating to the Control of Narcotic Drugs*. The Legal Committee of the International Civil Aviation Organization is now planning a publication of national laws and regulations on aviation.

69. At the present time, there would seem to be need for a collection of national laws on many topics, such as nationality, territorial sea, and exploitation of the natural resources of submarine areas of the high seas. The *Legislative Series* published by the International Labour Office supplies prototype for such publications.

70. Various reviews of the current legislation of particular countries are regularly published. The British Society of Comparative Legislation has long published in its *Journal of Comparative Legislation and International*

Law valuable reviews of the legislation of various parts of the British Empire. From 1930 to 1940, the League of Nations Library published a *Chronology (Répertoire) of International Treaties and Legislative Measures*; a continuance of that *Chronology* by the United Nations Secretariat might be envisaged.

E. Diplomatic Correspondence

71. The diplomatic correspondence between Governments must supply abundant evidence of customary international law. For various reasons, however, much of the correspondence is not published. Within the limits set by propriety, some Governments publish selected texts of diplomatic exchanges, but frequently only after a lapse of years. Archives of foreign offices are in some cases opened to access by qualified scholars engaged in research, but usually only up to a particular time.

72. It is unnecessary to attempt to list the publications of their diplomatic correspondence issued by various Governments. Of the bibliographical aids in this connexion, mention may be made of *Guide International des Archives—Europe*, published by the Institute of Intellectual Co-operation in 1934. The memorandum placed before the Commission by the Secretary-General lists (A/CN.4/6, pages 10–12) the periodical publications issued by the States of Latin America, and refers (pages 13–20) to the principal publications of France, Germany, the Soviet Union, the United Kingdom and the United States of America. Meyer's *Official Publications of European Governments* (1929) lists the current publications of eight other Governments. The Union of Soviet Socialist Republics has recently published a collection of diplomatic correspondence on the eve of the war of 1939. A vast library would be required to house all such publications, and for the most part they are of interest chiefly to historians. If reproduction were contemplated, it seems questionable whether new processes, such as microfilming, would offer much relief.

73. In some countries, digests of their diplomatic correspondence have been compiled, which have a certain usefulness generally. An outstanding example of such a digest is the digest of the diplomatic correspondence of European States, published in *Fontes Juris Gentium*, Series B, Sectio 1, Tomus 1 (in two parts) and Tomus 2 (in three parts), covering the period from 1856 to 1878.

74. A series of digests relating especially to United States of America materials included diplomatic correspondence—the three volumes of Wharton's *Digest* (1886), the eight volumes of Moore's *Digest* (1906), and the eight volumes of Hackworth's *Digest* (1940). Suggestions have emanated from various quarters that other such digests are needed.

75. Some reserve may be required in the use of such digests; a well-known compiler, John Bassett Moore, was careful to point out in a preface that

"Mere extracts from State papers or judicial decisions cannot be safely relied on as guides to the law. They may indeed be positively misleading. Especially is this true of State papers, in which arguments are often contentiously put forth which by no means represent the eventual view of the government in whose behalf they were employed."

F. Opinions of National Legal Advisers

76. The opinions on questions of international law given by legal advisers to Governments are published in few countries. Reserve may be needed in assessing the value of such opinions as evidence of customary international law, for the efforts of legal advisers are necessarily directed to the implementation of policy. Nor would a reproduction of such opinions be of much value unless it were accompanied by an adequate analysis of the history leading up to the occasions with reference to which they were given.

77. The two volumes of *Great Britain and the Law of Nations*, published by H. A. Smith in 1932 and 1935, exemplify the use of such opinions as illustrations of the development of customary international law. Admirable use of British opinions was made also in McNair's *Law of Treaties* (1938). The regularly published *Opinions of the Attorney General of the United States* may also be mentioned in this connexion; a digest of such opinions, published in three volumes, covers the period 1789-1921. The single volume of *Jurisprudencia de la Cancillería Chilena*, by Cruchaga Ossa, covers the period down to 1865.

G. Practice of International Organizations

78. Records of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States' relations to the organizations. The *Répertoire of Questions of General International Law before the League of Nations, 1920-1940*, published by the Geneva Research Center in 1942, contained chiefly statements in the *Official Journal* of the League of Nations concerning questions of international law. It is understood that a *répertoire* of its practice is planned by the Secretariat of the United Nations.

4. AVAILABILITY OF EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

79. In the foregoing survey of various types of evidence of customary international law, little attention has been given to the availability of published materials. It may be desirable to attempt some analysis of the concept of availability, before suggesting specific "ways and means for making the evidence of customary international law more readily available."

80. Availability may be considered in three aspects. First, availability for meeting the needs of particular groups of persons. Second, the extent

to which materials already published are available throughout the world. Third, the extent to which materials not yet published may be made available throughout the world. Article 24 of the Commission's Statute seems to envisage the third aspect in its reference to "collection and publication of documents" (*la compilation et la publication de documents*); it does not expressly envisage the first and second aspects.

81. In the first aspect of availability, account should be taken of the needs of private individuals engaged in the exploration of problems of international law, as well as of the needs of governmental and international officials. The needs of the three groups are not necessarily the same. An individual may be able to undertake wider investigations than those which government officials ordinarily have time to pursue. Access to extensive libraries is desirable for all three groups, but officials must often rely on works of ready reference.

82. For the most part, the published materials mentioned in the foregoing survey are to be found only in great libraries of international law. Unfortunately, such libraries are few and far between. The Library of the Peace Palace at The Hague, which serves the needs of the International Court of Justice, has few counterparts in the capitals of States. Indeed, it seems possible that in some capitals no working library of international law exists. This situation has a bearing on the general outlook for international law. The establishment of libraries containing the principal collections of published materials which serve as evidence of customary international law would require much labour and expense, as well as time. The problem of creating new libraries seems to lie beyond the scope of the inquiry undertaken by the Commission, but attention might be given to it by other organs of the United Nations.

83. As to the second aspect of availability, it is extremely difficult to estimate the present availability of many of the principal collections of evidence of customary international law, which have been published. In many instances, stocks probably do not exist to be drawn upon for meeting present or future demands. For example, it would probably be difficult to obtain a complete set of de Martens' *Nouveau Recueil Général de Traités*.

84. The Commission invited the Secretariat of the United Nations to undertake an inquiry as to the present availability of the *League of Nations Treaty Series*, the publications of the Permanent Court of International Justice, and the awards of tribunals of the Permanent Court of Arbitration. The inquiry revealed that the European Office of the United Nations has on hand for distribution stocks of the *League of Nations Treaty Series*, and that the Registry of the International Court of Justice is similarly possessed of stocks of the publications of the Permanent Court; it was revealed also, that the Secretary-General of the Permanent Court of Arbitra-

tion holds, for distribution on demand, stocks (in some cases few copies) of the awards of tribunals of that Court.

85. The Commission also inquired of the Secretariat concerning the current distribution of the *United Nations Treaty Series* and the publications of the International Court of Justice, emphasizing the need for constant attention to such distribution. It appears that a generally satisfactory system for distribution is maintained and that, with the exception of Volumes 18-23 of the *Treaty Series*, adequate stocks are being kept on hand.

86. As to the third aspect of availability, the Commission could draw up a list of certain types of evidence of customary international law which are not adequately covered by existing publications. The foregoing survey mentions some of the *lacunae*, but it is a difficult task to say what procedure should be followed in attempting to fill them. The Commission itself is not in a position to launch any new series of publications; it can, however, suggest that the Secretariat of the United Nations should undertake certain types of publications.

87. It seems doubtful that much can be done to stimulate the publication by Governments of materials on international law. The suggestion has been advanced from time to time that more Governments should issue digests of their international practice, along the lines of some of the well-known digests issued in the past under government sponsorship. It would serve little purpose for the Commission to renew the suggestion, for artificial stimulus of such arduous enterprises does not promise much in the way of results.

88. The Commission has considered means by which the publications currently issued by Governments could be made more widely available. It seems possible that a plan could be worked out for a general exchange between Governments of such of their publications as relate to customary international law. Some eighteen States are now parties to the 1886 Brussels Convention for the International Exchange of Official Documents, and some thirteen American States are parties to the 1936 Inter-American Convention on the subject; some fifty bipartite treaties on the subject have been concluded, also. The possibility of a new convention in a broader framework than that now contemplated was recently considered by the United Nations Educational, Scientific and Cultural Organization.

89. Results of the fruitful activities of non-official scientific bodies have appeared in the numerous reviews, and recent years have seen the launching of yearbooks or journals of international law in a number of countries. Despite these manifestations of zeal, it seems doubtful that many national or international institutes exist which may be relied upon for the sustained effort involved in the publication of useful compendiums of the evidence of customary international law. Few of them can undertake and continue a long-range programme of solid work; their personnel changes

rapidly, their interest is easily deflected, and their funds are seldom adequate.

5. SPECIFIC WAYS AND MEANS SUGGESTED BY THE COMMISSION

90. The Commission recommends that the widest possible distribution be made of publications relating to international law issued by organs of the United Nations, particularly the *Reports* and other publications of the International Court of Justice, the *United Nations Treaty Series*, and the *Reports of International Arbitral Awards*. To this end, the price at which such publications are sold should be kept as low as is consistent with budgetary limitations, and considerations of economy should not preclude the maintenance of the stocks necessary for meeting future demands. The Commission attaches special importance to the continuance of the present language system of the *United Nations Treaty Series*—i.e., reproduction of the original text with translations—as essential to the general usefulness of the Series. It expresses the *voeu*, also, that the texts of international instruments registered with, or filed and recorded by, the Secretariat, should be published with the greatest possible promptness.

91. The Commission recommends that, insofar as it has not already done so, the General Assembly of the United Nations should authorize the Secretariat to prepare and issue, with as wide a distribution as possible, the following publications:

- (a) A Juridical Yearbook, setting forth, *inter alia*, significant legislative developments in various countries; current arbitral awards by *ad hoc* international tribunals; significant decisions of national courts relating to problems of international law and particularly those concerning multipartite international conventions. The need for such a publication is especially urgent because of the great difficulty long encountered by interested persons in their efforts to keep abreast of current developments. The Commission now has before it a topic—the continental shelf under the high seas—which affords an example of both the need and the difficulty.
- (b) A Legislative Series containing the texts of current national legislation on matters of international interest, and particularly legislation implementing multipartite international instruments. In connexion with this series, the Secretariat should assemble and publish from time to time collections of the texts of national legislation on special topics of general interest; for example, on such topics as nationality, territorial sea, and submarine areas of the high seas.
- (c) A collection of the constitutions of all States, with supplementary volumes to be issued from time to time for keeping it up to date. Precise knowledge of constitutional provisions of other countries is essential to those who in any country are engaged in negotiating treaties.

- (d) A list of the publications issued by the Governments of all States containing the texts of treaties concluded by them, supplemented by a list of the principal collections of treaty texts published under private auspices.
- (e) A consolidated index of the *League of Nations Treaty Series*. This publication is essential to the wider use of the Series.
- (f) Occasional index volumes of the *United Nations Treaty Series*.
- (g) A *répertoire* of the practice of the organization of the United Nations with regard to questions of international law.
- (h) Additional series of the *Reports of International Arbitral Awards*, of which a first series has already been published in three volumes.

92. The Commission recommends that the Registry of the International Court of Justice should publish occasional digests of the Court's *Reports*.

93. The Commission recommends that the General Assembly call to the attention of Governments the desirability of their publishing digests of their diplomatic correspondence and other materials relating to international law.

94. The Commission recommends that the General Assembly give consideration to the desirability of an international convention concerning the general exchange of official publications relating to international law and international relations.

PART III: FORMULATION OF THE NÜRNBERG PRINCIPLES^a

95. Under General Assembly resolution 177 (II), paragraph (a), the International Law Commission was directed to "formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal."

96. In pursuance of this resolution of the General Assembly, the Commission undertook a preliminary consideration of the subject at its first session. In the course of this consideration the question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and judgment constituted principles of international law. The conclusion was that since the Nürnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission by paragraph (a) of resolution 177 (II) was not to express any appreciation

^a Mr. Ricardo J. Alfaro declared that he voted in favour of Part III of the report with a reservation as to paragraph 96, because he believed that the reference therein contained regarding the task of formulating the Nürnberg principles should have been inserted in the report together with a quotation of the passage in the judgment of the Nürnberg Tribunal in which the Tribunal asserted that the Charter "is the expression of international law existing at the time of its creation, and to that extent is itself a contribution to international law."

In abstaining from the vote on this part of the report, Mr. Manley O. Hudson stated that some uncertainty had existed as to the precise nature of the task entrusted to the

of these principles as principles of international law but merely to formulate them. This conclusion was set forth in paragraph 26 of the report of the Commission on its first session, which report was approved by the General Assembly in 1949. Mr. Jean Spiropoulos was appointed special rapporteur to continue the work of the Commission on the subject and to present a report at its second session.

97. At the session under review, Mr. Spiropoulos presented his report (A/CN.4/22) which the Commission considered at its 44th to 49th and 54th meetings. On the basis of this report, the Commission adopted a formulation of the principles of international law which were recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal. The formulation by the Commission, together with comments thereon, is set out below.

PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED IN THE CHARTER OF THE
NÜRNBERG TRIBUNAL AND IN THE JUDGMENT OF THE TRIBUNAL

PRINCIPLE I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

98. This principle is based on the first paragraph of Article 6 of the Charter of the Nürnberg Tribunal which established the competence of the Tribunal to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the crimes defined in sub-paragraphs (a), (b), and (c) of Article 6. The text of the Charter declared punishable only persons "acting in the interests of the European Axis countries" but, as a matter of course, Principle I is now formulated in general terms.

Commission. In the report of the Commission covering its first session, which was approved by the General Assembly, the view was put forward that "the task of the Commission was not to express any appreciation of these principles [namely the Nürnberg principles] as principles of international law but merely to formulate them." In his opinion, however, the Commission had not altogether adhered to that view in its later work, with the result that doubt subsisted as to the juridical character of the formulation adopted. Moreover, the formulation had not sufficiently taken into account the special character of the Charter and judgment of the International Military Tribunal and the *ad hoc* purpose which they served.

Mr. Georges Scelle said that he regretted that he could not accept the view taken by the Commission of its task in this part of the report, for the same reasons as those which he had stated the previous year. The report did not enunciate the general principles of law on which the provisions of the Charter and the decisions of the Tribunal were based, but merely summarized some of them, whereas the Tribunal itself had stated that the principles it had adopted were already a part of positive international law at the time when it was established. Moreover, he considered that the final text of the report did not seem to reflect accurately the conclusions reached by the Commission during its preliminary discussions, and restricted their scope.

99. The general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law. The findings of the Tribunal were very definite on the question whether rules of international law may apply to individuals. "That international law imposes duties and liabilities upon individuals as well as upon States," said the judgment of the Tribunal, "has long been recognized."⁴ It added: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced."⁵

PRINCIPLE II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

100. This principle is a corollary to Principle I. Once it is admitted that individuals are responsible for crimes under international law, it is obvious that they are not relieved from their international responsibility by the fact that their acts are not held to be crimes under the law of any particular country.

101. The Charter of the Nürnberg Tribunal referred, in express terms, to this relation between international and national responsibility only with respect to crimes against humanity. Sub-paragraph (c) of Article 6 of the Charter defined as crimes against humanity certain acts "whether or not [committed] in violation of the domestic law of the country where perpetrated." The Commission has formulated Principle II in general terms.

102. The principle that a person who has committed an international crime is responsible therefor and liable to punishment under international law, independently of the provisions of internal law, implies what is commonly called the "supremacy" of international law over national law. The Tribunal considered that international law can bind individuals even if national law does not direct them to observe the rules of international law, as shown by the following statement of the judgment: "... the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State."⁶

⁴ *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I, Nürnberg 1947, page 223.

⁵ *Ibid.*

⁶ *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I, Nürnberg 1947, page 223.

PRINCIPLE III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

103. This principle is based on Article 7 of the Charter of the Nürnberg Tribunal. According to the Charter and the judgment, the fact that an individual acted as Head of State or responsible government official did not relieve him from international responsibility. "The principle of international law which, under certain circumstances, protects the representatives of a State," said the Tribunal, "cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment. . . ." ⁷ The same idea was also expressed in the following passage of the findings: "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law." ⁸

104. The last phrase of Article 7 of the Charter, "or mitigating punishment," has not been retained in the formulation of Principle III. The Commission considers that the question of mitigating punishment is a matter for the competent Court to decide.

PRINCIPLE IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

105. This text is based on the principle contained in Article 8 of the Charter of the Nürnberg Tribunal as interpreted in the judgment. The idea expressed in Principle IV is that superior orders are not a defence provided a moral choice was possible to the accused. In conformity with this conception, the Tribunal rejected the argument of the defence that there could not be any responsibility since most of the defendants acted under the orders of Hitler. The Tribunal declared: "The provisions of this article [Article 8] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in

⁷ *Ibid.*

⁸ *Ibid.*

the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."⁹

106. The last phrase of Article 8 of the Charter "but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires," has not been retained for the reason stated under Principle III, in paragraph 104 above.

PRINCIPLE V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

107 The principle that a defendant charged with a crime under international law must have the right to a fair trial was expressly recognized and carefully developed by the Charter of the Nürnberg Tribunal. The Charter contained a chapter entitled: "Fair Trial for Defendants," which for the purpose of ensuring such fair trial provided the following procedure:

- "a. The indictment shall include full particulars specifying in detail the charges against the defendants. A copy of the indictment and of all the documents lodged with the indictment, translated into a language which he understands, shall be furnished to the defendant at a reasonable time before the trial.
- "b. During any preliminary examination or trial of a defendant he shall have the right to give any explanation relevant to the charges made against him.
- "c. A preliminary examination of a defendant and his trial shall be conducted in, or translated into, a language which the defendant understands.
- "d. A defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of counsel.
- "e. A defendant shall have the right through himself or through his counsel to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution."

108. The right to a fair trial was also referred to in the judgment itself. The Tribunal said in this respect: "With regard to the constitution of the Court all that the defendants are entitled to ask is to receive a fair trial on the facts and law."¹⁰

109. In the view of the Commission, the expression "fair trial" should be understood in the light of the above-quoted provisions of the Charter of the Nürnberg Tribunal.

⁹ *Ibid.*, page 224.

¹⁰ *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I, Nürnberg 1947, page 218.

PRINCIPLE VI

The crimes hereinafter set out are punishable as crimes under international law:

a. Crimes against peace:

- (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

110. Both categories of crimes are characterized by the fact that they are connected with "war of aggression or war in violation of international treaties, agreements or assurances."

111. The Tribunal made a general statement to the effect that its Charter was "the expression of international law existing at the time of its creation."¹¹ It, in particular, refuted the argument of the defence that aggressive war was not an international crime. For this refutation the Tribunal relied primarily on the General Treaty for the Renunciation of War of 27 August 1928 (Kellogg-Briand Pact) which in 1939 was in force between sixty-three States. "The nations who signed the Pact or adhered to it unconditionally," said the Tribunal, "condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who planned and waged such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact."¹²

112. In support of its interpretation of the Kellogg-Briand Pact, the Tribunal cited some other international instruments which condemned war of aggression as an international crime. The draft of a Treaty of Mutual Assistance sponsored by the League of Nations in 1923 declared, in its Article 1, "that aggressive war is an international crime." The Preamble to the League of Nations Protocol for the Pacific Settlement of International Disputes (Geneva Protocol), of 1924, "recognizing the solidarity of the members of the International Community," stated that "a war of aggression constitutes a violation of this solidarity, and is an international crime," and that the contracting parties were "desirous of facilitating the complete application of the system provided in the Covenant of the League

¹¹ *Ibid.*

¹² *Ibid.*, page 220.

of Nations for the pacific settlement of disputes between the States and of ensuring the repression of international crimes." The declaration concerning wars of aggression adopted on 24 September 1927 by the Assembly of the League of Nations declared, in its preamble, that war was an "international crime." The resolution unanimously adopted on 18 February 1928 by twenty-one American Republics at the Sixth (Havana) International Conference of American States, provided that "war of aggression constitutes an international crime against the human species."¹³

113. The Charter of the Nürnberg Tribunal did not contain any definition of "war of aggression," nor was there any such definition in the judgment of the Tribunal. It was by reviewing the historical events before and during the war that it found that certain of the defendants planned and waged aggressive wars against twelve nations and were therefore guilty of a series of crimes.

114. According to the Tribunal, this made it unnecessary to discuss the subject in further detail, or to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements, or assurances."¹⁴

115. The term "assurances" is understood by the Commission as including any pledge or guarantee of peace given by a State, even unilaterally.

116. The terms "planning" and "preparation" of a war of aggression were considered by the Tribunal as comprising all the stages in the bringing about of a war of aggression from the planning to the actual initiation of the war. In view of that, the Tribunal did not make any clear distinction between planning and preparation. As stated in the judgment, "planning and preparation are essential to the making of war."¹⁵

117. The meaning of the expression "waging of a war of aggression" was discussed in the Commission during the consideration of the definition of "crimes against peace." Some members of the Commission feared that everyone in uniform who fought in a war of aggression might be charged with the "waging" of such a war. The Commission understands the expression to refer only to high-ranking military personnel and high State officials, and believes that this was also the view of the Tribunal.

118. A legal notion of the Charter to which the defence objected was the one concerning "conspiracy." The Tribunal recognized that "conspiracy is not defined in the Charter."¹⁶ However, it stated the meaning of the term, though only in a restricted way. "But in the opinion of the Tribunal," it was said in the judgment, "the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found

¹³ *Ibid.*, pages 221-222.

¹⁵ *Ibid.*, page 224.

¹⁴ *Ibid.*, page 216.

¹⁶ *Ibid.*, page 225.

in the twenty-five points of the Nazi Party, announced in 1920, or the political affirmations expressed in *Mein Kampf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan."¹⁷

b. War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

119. The Tribunal emphasized that before the last war the crimes defined by Article 6 (b) of its Charter were already recognized as crimes under international law. The Tribunal stated that such crimes were covered by specific provisions of the Regulations annexed to the Hague Convention of 1907 respecting the Laws and Customs of War on Land and of the Geneva Convention of 1929 on the Treatment of Prisoners of War. After enumerating the said provisions, the Tribunal stated: "That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument."^{18, 19}

c. Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

120. Article 6 (c) of the Charter of the Nürnberg Tribunal distinguished two categories of punishable acts, to wit: first, murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, and second, persecution on political, racial or religious grounds. Acts within these categories, according to the Charter, constituted international crimes only when committed "in execution of or in connexion with any crimes within the jurisdiction

¹⁷ *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I, Nürnberg 1947, page 225.

¹⁸ *Ibid.*, page 253.

¹⁹ During its discussion on the crime of killing hostages, the Commission took note of the fact that the Geneva Conventions of 12 August 1949, and more specifically Article 34 of the Convention relative to the Protection of Civilian Persons in Time of War, prohibit the *taking* of hostages.

of the Tribunal." The crimes referred to as falling within the jurisdiction of the Tribunal were crimes against peace and war crimes.

121. Though it found that "political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty," that "the policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out," and that "the persecution of Jews during the same period is established beyond all doubt," the Tribunal considered that it had not been satisfactorily proved that before the outbreak of war these acts had been committed in execution of, or in connexion with, any crime within the jurisdiction of the Tribunal. For this reason the Tribunal declared itself unable to "make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter."²⁰

122. The Tribunal did not, however, thereby exclude the possibility that crimes against humanity might be committed also before a war.

123. In its definition of crimes against humanity the Commission has omitted the phrase "before or during the war" contained in Article 6 (c) of the Charter of the Nürnberg Tribunal because this phrase referred to a particular war, the war of 1939. The omission of the phrase does not mean that the Commission considers that crimes against humanity can be committed only during a war. On the contrary, the Commission is of the opinion that such crimes may take place also before a war in connexion with crimes against peace.

124. In accordance with Article 6 (c) of the Charter, the above formulation characterizes as crimes against humanity murder, extermination, enslavement, etc., committed against "any" civilian population. This means that these acts may be crimes against humanity even if they are committed by the perpetrator against his own population.

PRINCIPLE VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is
a crime under international law.

125. The only provision in the Charter of the Nürnberg Tribunal regarding responsibility for complicity was that of the last paragraph of Article 6 which reads as follows: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan."

²⁰ *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I, Nürnberg 1947, page 254.

126. The Tribunal, commenting on this provision in connexion with its discussion of count one of the indictment, which charged certain defendants with conspiracy to commit aggressive war, war crimes and crimes against humanity, said that, in its opinion, the provision did not "add a new and separate crime to those already listed." In the view of the Tribunal, the provision was designed to "establish the responsibility of persons participating in a common plan"²¹ to prepare, initiate and wage aggressive war. Interpreted literally, this statement would seem to imply that the complicity rule did not apply to crimes perpetrated by individual action.

127. On the other hand, the Tribunal convicted several of the defendants of war crimes and crimes against humanity because they gave orders resulting in atrocious and criminal acts which they did not commit themselves. In practice, therefore, the Tribunal seems to have applied general principles of criminal law regarding complicity. This view is corroborated by expressions used by the Tribunal in assessing the guilt of particular defendants.²²

PART IV: THE QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION

128. The General Assembly, by resolution 260·B(III), invited the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions," and requested it, in carrying out that task, "to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice."

129. At its first session, the Commission appointed as special rapporteurs to deal with this question Messrs. Ricardo J. Alfaro and A. E. F. Sandström who were requested to submit to the Commission, at its second session, one or more working papers on the subject.

130. At the second session, each of the special rapporteurs presented a report. These reports were discussed by the Commission during its 41st to 44th meetings.

131. In presenting his report (A/CN.4/20), Mr. Sandström first raised the question whether the judicial organ mentioned in the resolution was to be created as an organ of the United Nations and stated that, in that case, an amendment of the Charter of the United Nations would be necessary.

132. Several members of the Commission held the view that an international criminal court could be created by means of a convention open to signature by States, Members and non-members of the United Nations; that such a court was not necessarily envisaged as an organ of the United

²¹ *Ibid.*, page 226.

²² *Ibid.*, pages 281, 287, 295, 298, 306, 314, 319, 320, 321, 330.

Nations; that Article 7 of the Charter contained a mere enumeration of the principal organs of the United Nations; that the said article did not preclude the possibility of creating new subsidiary organs; and that, therefore, the creation of an international judicial organ as contemplated by the resolution would not require an amendment of the Charter. It was pointed out, furthermore, that the essential question before the Commission was whether it was desirable and possible to create an international criminal jurisdiction, and that the problem with which the General Assembly was concerned would be the same, whether a judicial organ were set up within the framework of the United Nations or outside the organization.

133. On the question of desirability and possibility of establishing an international criminal court, Mr. Sandström stated that he could only consider the problem in a concrete manner; and that it was impossible under such conditions to consider separately desirability and possibility.

134. Mr. Sandström expressed the view that an international judicial organ such as envisaged in the resolution of the General Assembly would be desirable only if effective. Whether established within or without the framework of the United Nations, such an international judicial organ would have the defects which he had pointed out in his report and would be ineffective, especially in respect of grave international crimes. He therefore concluded that its establishment was not desirable.

135. The Commission next considered the report presented by Mr. Alfaro (A/CN.4/15, A/CN.4/15/Corr.1). With regard to the question of desirability, Mr. Alfaro stated that if "desirable" meant useful and necessary, the creation of an international criminal jurisdiction vested with power to try and punish persons who disturbed international public order was desirable as an effective contribution to the peace and security of the world. In the community of States, as in national communities, there were aggressors and disturbers of the peace, and mankind had a right to protect itself against international crimes by means of an adequate system of international repression. The rule of law in the community of States could only be ensured by the establishment of such a system. Public opinion had been in favour of an international criminal jurisdiction since the end of the First World War, when the Treaty of Versailles provided for the arraignment of William of Hohenzollern for "a supreme offence against international morality and the sanctity of treaties." Such public opinion had found expression also in the official and unofficial action, plans and views emanating from Governments, international bodies, law associations, statesmen and jurists, as stated in Part II of Mr. Alfaro's report. Mr. Alfaro also expressed his conviction that the creation of an international organ of criminal justice would have a deterring effect on potential aggressors and that even if its establishment were not feasible, it would always be desirable.

136. As to the possibility of establishing the judicial organ envisaged, Mr. Alfaro stated that he could not see any legal reason which made it impossible for States to set up by convention a judicial organ for the trial of persons responsible for crimes under international law. That the creation of such an organ was juridically and politically possible seemed to be demonstrated by several facts, namely, that the Treaty of Versailles made provision to that effect; that by the Geneva Convention of 1937, thirteen nations agreed to create an international judicial organ for the trial of persons responsible for terrorism; that the two International Military Tribunals of Nürnberg and Tokyo had been created and had actually functioned; and that seven different draft statutes for international criminal organs had been formulated by, presented to, or adopted by, official and non-official entities (A/CN.4/7/Rev.1, pages 47-147).

137. Some members of the Commission referred to the many difficulties which the establishment and functioning of an international criminal jurisdiction would encounter, as for instance, that nations would refuse to give up their territorial jurisdiction or to submit to the compulsory jurisdiction of the international organ; that a tribunal would be unable to bring the accused before it and to enforce its judgments; and that the Tribunals of Nürnberg and Tokyo could function effectively only because the States which established these Tribunals were occupying the territory in which the trials took place and had the accused in their power; that punishment of aggressors would depend on their being on the losing side, and that no illusory ideas should be encouraged as to the possibility of setting up the organ in question.

138. Other members of the Commission held the view that while difficulties undeniably existed, they did not constitute an impossibility. If States were free to refuse to submit to an obligatory international criminal jurisdiction, they had also the power to agree thereto. Though the community of States lacked a police force at the present time, it might have one in the future.

139. It was pointed out by some members that the Commission was only concerned with the legal and technical aspects of the question and that it was for the General Assembly to weigh the purely political considerations that might militate in favour of or against the creation of an international criminal court. The view was stated that, even if it were found that the establishment of the international judicial organ envisaged was not practicable or expedient at this time, this did not mean that it was not possible.

140. After consideration of the matter by the Commission, the Chairman put the two points discussed to the vote, with the following results:

By 8 votes to one, with 2 abstentions, the Commission decided that the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions is desirable.

By 7 votes to 3, with one abstention, the Commission decided that the establishment of the above-mentioned international judicial organ is possible.

141. The Commission took up next the question of the possibility of establishing a criminal chamber of the International Court of Justice.

142. In their reports, Mr. Sandström and Mr. Alfaro were agreed that the establishment of a criminal chamber of the International Court of Justice, vested with power to try persons accused of certain crimes, would necessitate an amendment of the Statute of the Court which, in Article 34, provided that only States may be parties in cases before the Court.

143. Mr. Alfaro stated in his report that, subject to this condition, the creation of a criminal chamber was possible. At the opening of the discussion of this part of his report, he stated that this did not imply that he favoured the creation of a criminal chamber of the International Court of Justice.

144. Mr. Sandström expressed his agreement with the objections raised by some members of the Commission against the creation of a criminal chamber of the International Court of Justice.

145. After an exchange of views on different aspects of this question, the Commission decided to state that it has paid attention to the possibility of establishing a criminal chamber of the International Court of Justice and that, though it is possible to do so by amendment of the Court's Statute, the Commission does not recommend it.

PART V: PREPARATION OF A DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

146. By resolution 177(II), paragraph (b), the General Assembly requested the International Law Commission to prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

147. At its first session the Commission appointed Mr. Jean Spiropoulos special rapporteur on this subject and invited him to prepare a working paper for submission to the Commission at its second session. The Commission also decided that a questionnaire should be circulated to Governments inquiring what offences, apart from those defined in the Charter and judgment of the Nürnberg Tribunal, should, in their view, be comprehended in the draft code.

148. At the session under review, Mr. Spiropoulos presented his report (A/CN.4/25) to the Commission, which took it as a basis of discussion. The subject was considered by the Commission at its 54th to 62nd and 72nd meetings. The Commission also took into consideration the replies received from Governments (A/CN.4/19, Part II, A/CN.4/19/Add.1 and A/CN.4/19/Add.2) to its questionnaire.

149. The Commission first considered the meaning of the term "offences against the peace and security of mankind," contained in resolution 177(II). The view of the Commission was that the meaning of this term should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security, and that the draft code, therefore, should not deal with questions concerning conflicts of legislation and jurisdiction in international criminal matters. Nor should such matters as piracy, traffic in dangerous drugs, traffic in women and children, slavery, counterfeiting currency, damage to submarine cables, etc., be considered as falling within the scope of the draft code.

150. The Commission thereafter discussed the meaning of the phrase "indicating clearly the place to be accorded to" the Nürnberg principles. The sense of the Commission was that this phrase should not be interpreted as meaning that the Nürnberg principles would have to be inserted in their entirety in the draft code. The Commission felt that the phrase did not preclude it from suggesting modification or development of these principles for the purpose of their incorporation in the draft code.

151. The question as to the subjects of criminal responsibility under the draft code was then examined by the Commission. The Commission decided that it would only deal with the criminal responsibility of individuals.

152. Several meetings were devoted to a discussion of the particular offences to be included in the draft code. Tentative decisions were taken by the Commission on this matter and referred to the Drafting Sub-Committee mentioned in paragraph 157 below.

153. The Chairman brought to the attention of the Commission a communication from the United Nations Educational, Scientific and Cultural Organization in which it was recommended that, with a view to the protection of historical monuments and documents and works of art in case of armed conflict, the destruction of such cultural objects should be defined as a crime punishable under international law. The Commission took note of the recommendation and agreed that such destruction comes within the general concept of war crimes. The matter will be given detailed consideration when the definitive drafting of the code is undertaken.

154. The Commission considered at some length the responsibility of a person acting as Head of State or as responsible government official. The tentative decision taken on this matter follows the relevant principle of the Nürnberg Charter and judgment as formulated by the Commission.²³

155. In respect of the responsibility of a person acting under superior orders, the Commission also decided tentatively to follow the relevant

²³ See Principle III in Part III of the present report.

principle of the Nürnberg Charter and judgment, as formulated by the Commission.²⁴

156. Another problem considered by the Commission was the implementation of the code. The Commission concluded that, pending the establishment of a competent international criminal court, such implementation would have to be achieved through the enactment, by the States adopting the code, of the necessary legislation for the trial and punishment of persons charged with offences under the code.

157. In the light of the deliberations in the Commission, a Drafting Subcommittee, composed of Messrs. Alfaro, Hudson and Spiropoulos, prepared a provisional draft of a code (A/CN.4/R.6). This draft was referred by the Commission to the special rapporteur, Mr. Spiropoulos, who was requested to continue work on the subject and to submit a further report to the Commission at its third session.

PART VI: PROGRESS OF WORK ON TOPICS SELECTED FOR CODIFICATION

158. The International Law Commission at its first session, having in pursuance of Article 18 of its Statute, surveyed the whole field of international law with a view to selecting topics for codification, decided to give priority to three topics from fourteen provisionally selected for codification. These three topics were:

- (1) Law of treaties;
- (2) Arbitral procedure;
- (3) Regime of the high seas.

159. The Commission, at its second session, considered reports on these three subjects and reached certain decisions which were not intended to have a definitive and binding character, but to serve for the guidance of the special rapporteurs in their future work. The special rapporteurs were requested to continue work on the topics in the light of the discussions which had taken place in the Commission and to submit further reports at the next session.

CHAPTER I

LAW OF TREATIES

160. At its first session the International Law Commission elected as special rapporteur for the law of treaties, Mr. James L. Brierly, who prepared a report (A/CN.4/23) on the topic for the second session of the Commission. The Commission devoted its 49th to 53rd meetings to a preliminary discussion of this report with a view to assisting the special rapporteur in the continuance of his work between the second and third sessions of the Commission. The Commission also had available replies

²⁴ See Principle IV in Part III of the present report.

of Governments to a questionnaire addressed to them under Article 19, paragraph 2, of its Statute (A/CN.4/19, Part I, A).

161. The Commission devoted some time to a consideration of the scope of the subject to be covered in its study. Though it took a provisional decision that exchanges of notes should be covered, it did not undertake to say what position should be given to them by the special rapporteur. A majority of the Commission favoured the explanation of the term "treaty" as a "formal instrument" rather than as an "agreement recorded in writing." Mention was frequently made by members of the Commission of the desirability of emphasizing the binding character of the obligations under international law established by a treaty.

162. A majority of the Commission were also in favour of including in its study agreements to which international organizations are parties. There was general agreement that while the treaty-making power of certain organizations is clear, the determination of the other organizations which possess capacity for making treaties would need further consideration.

163. On the question of the effect of constitutional provisions as to the exercise of capacity to make treaties, there was a divergence of views and no decision was reached.

164. Finally, the Commission discussed the part of the special rapporteur's report dealing with reservations. There was a large measure of agreement on the general principles on this topic formulated in the report, and particularly on the point that a reservation requires the consent at least of all parties to become effective. But the application of these principles in detail to the great variety of situations which may arise in the making of multilateral treaties was felt to require further consideration.

CHAPTER II

ARBITRAL PROCEDURE

165. At its first session the International Law Commission elected Mr. Georges Scelle special rapporteur to study the topic of arbitral procedure. At its second session, Mr. Scelle submitted his report (A/CN.4/18) in which he proposed a preliminary draft of a code of arbitral procedure. The Commission also had before it the replies of Governments (A/CN.4/19, Part I, B) to a questionnaire circulated by it.

166. The Commission devoted its 70th to 73rd meetings to a discussion of the subject.

167. The report of the special rapporteur, which served as the basis of discussion in the Commission, was confined to arbitration between States, or inter-governmental arbitration.

168. The special rapporteur emphasized the following thesis: An arbitration procedure had already been drawn up by the Hague Conferences of 1899 and 1907 and by the League of Nations (General Act of 26 September 1928, revised by the General Assembly of the United Nations in 1949).

The elements of codification therefore existed but needed to be consolidated and developed. At the present time, States were bound by numerous undertakings to have recourse to arbitration, but it sometimes happened that they sought to evade their obligations, *inter alia*, by making the constitution of an arbitral tribunal or the conclusion of a *compromis* impossible, or by hampering the functioning of the tribunal. A code of arbitral procedure should close those loopholes. It should be borne in mind that international arbitration was distinct from international jurisdiction proper in that it left it to the parties to define the issue and to choose the arbitrators. The arbitrators, however, made their award on the basis of law (Article 37 of the Hague Convention of 1907) and had to be furnished with all the powers necessary to perform their task. As the law stood at present, this was possible only if Governments acted in good faith and showed a conciliatory spirit. Normally, the Governments would draw up a *compromis* and, using varying procedures, appoint arbitrators. Provision should be made for intervention, in the absence of agreement between the parties, by an international authority whose decisions would be binding. In some cases that authority might be the arbitral tribunal itself and, in other cases, the International Court of Justice. The special rapporteur accordingly proposed that the arbitral tribunal should be constituted, if necessary, prior to the conclusion of the *compromis*, to enable it, if required, to draw up the *compromis* itself and adopt the procedure required to enable the award to be reached.

169. The Commission gave special attention to the first three paragraphs of the "proposed preliminary draft text," contained in the report of Mr. Scelle.

170. Paragraph I of this draft text read as follows:

"The compromissory clause or undertaking to have recourse to arbitration may apply to questions which may arise eventually or to questions already existing. Whatever the instrument or agreement on which it is based, the clause is strictly obligatory and must be implemented in good faith.

"In the event of dispute as to whether this obligation exists, the matter shall be referred to the International Court of Justice by a direct application submitted by the more diligent party, and the International Court of Justice shall pronounce final and binding judgment on the arbitrability of the dispute in a chamber of summary procedure and in application, in particular, of Articles 29 and 41 of its Statute (except where the parties to the dispute have expressly agreed on a different procedure for deciding this pre-judicial²⁵ question)."

171. In the view of Mr. Scelle, in the event of a dispute as to whether an issue existed or as to whether it fell within the terms of the obligation to arbitrate, the issue should be referred to a judicial authority for final

²⁵ The French term *préjudicielle* in the original text of the report of the special rapporteur might be better translated into English by the term "preliminary."

decision. That authority would be the International Court of Justice pronouncing judgment in a chamber of summary procedure.

172. The special rapporteur proposed, in the second place, that the International Court of Justice should be empowered to order provisional measures in accordance with Article 41 of its Statute. On the other hand, some members of the Commission pointed out that, if called upon to pass judgment, the Court would apply its Statute as a whole, including Article 41, without any need to refer to that article. The Commission recognized that the provisional measures referred to in Article 41 would cease to apply when the Court pronounced its judgment, whereas these measures ought to apply until the arbitral award had been given.

173. The Commission accepted the following text:

"If the parties disagree as to the existence of a dispute or as to whether an existing dispute is within the scope of the obligation to have recourse to arbitration, these questions ought, in the absence of agreement between the parties upon another procedure for dealing with it, to be brought before the Chamber for Summary Procedure of the International Court of Justice by any party by a written application, and the judgment rendered by the Chamber for Summary Procedure shall be final and without appeal."

174. Paragraph II of the draft text submitted by Mr. Scelle read as follows:

"If the dispute is of the kind referred to in the undertaking to resort to arbitration and cannot be settled within a reasonable time by diplomatic negotiation or other amicable means, the parties shall appoint an arbitrator or constitute an arbitral tribunal by mutual agreement in a special conventional instrument. The most diligent party shall take the initiative in this appointment.

"The appointment shall be made in accordance with the procedure agreed upon for this purpose in the instrument containing the undertaking to resort to arbitration. If nothing has been stipulated in this connexion in the said instrument, or if the parties are unable to agree, the most diligent party may have recourse to the procedure provided in articles 22 and 23 of the General Act of Arbitration, as revised by the General Assembly of the United Nations.

"If one of the parties, by systematically abstaining, obstructs the operation of the procedure laid down in the said articles, the missing arbitrators shall be appointed by the President of the International Court of Justice in accordance with article 23, paragraph 3, of the said General Act. The tribunal so constituted shall hear the case and its judgment shall be binding.

"When the arbitrator or members of the arbitral tribunal are appointed by mutual agreement, the parties may act in whatever manner they deem most appropriate and refer the matter to a single arbitrator, to an existing judicial body or to a tribunal constituted as they think fit.

"Nevertheless, generally speaking and having due regard to the circumstances of the case, it is recommended in the light of experience

(a) that the persons chosen as arbitrators should possess the qualifications set forth in Article 2 of the Statute of the International Court of Justice; (b) that the sole arbitrator or the majority of the arbitrators should be chosen from among the nationals of States having no direct interest in the case, that the tribunal should have an odd number of judges, preferably five, and that it should be presided over by one of the neutral judges."

175. The discussion on the above-quoted paragraph was brief and showed no wide divergencies of opinion. With regard to the first sub-paragraph, a member of the Commission observed that the expression "a reasonable time" was too vague. With regard to the second sub-paragraph, a member of the Commission said that the reference to Articles 22 and 23 of the General Act of 1928 did not provide an adequate solution. With regard to the third sub-paragraph, the special rapporteur agreed that the last sentence stipulating that "the tribunal so constituted shall hear the case and its judgment shall be binding" was superfluous. With regard to the fourth and fifth sub-paragraphs, some members of the Commission thought that it was unnecessary to elaborate the qualifications required of the arbitrators and that arbitration by Heads of State should not be excluded. On this last point, some other members of the Commission were of a different opinion, observing that the intervention by Heads of State was likely to introduce political elements in the arbitration. As to the number of arbitrators, some members of the Commission observed that it would not be necessary to provide for an arbitral tribunal composed of five members except in cases of important international disputes. It was also suggested that the adjective "direct" before the word "interest" in the fifth sub-paragraph should be deleted.

176. Paragraph III of the draft text proposed by Mr. Scelle read as follows:

"Once the arbitral tribunal has been set up by agreement between the parties or by the subsidiary procedures indicated above, it shall not be open to any of the contending Governments to alter its composition.

"If a vacancy occurs, the arbitrator shall be replaced by the method laid down for appointments.

"If it is necessary to replace a single arbitrator, the appointment of the new arbitrator shall, in the absence of agreement between the parties, be entrusted to the third Power which would have been competent to appoint the first arbitrator, or to the President of the International Court of Justice.

"An arbitrator may not participate in the judgment of a case with which he has previously had to deal in any capacity. Any doubt in this connexion shall be decided by the tribunal.

"A party may not propose the disqualification²⁶ of one of the arbitrators except on account of a fact arising subsequent to the constitu-

²⁶ The French term *récusation* used in the original text of the report of the special rapporteur might be better translated into English by the term "challenge."

tion of the tribunal unless it can reasonably be supposed to have been unaware of the fact or has been the victim of fraud. The matter shall be decided by the tribunal. In the case of a single arbitrator, the decision shall rest with the International Court of Justice through summary procedure.

"A 'national' arbitrator may not withdraw or be withdrawn by the Government which has appointed him. Should this occur, the tribunal is authorized to continue the proceedings and to render an award which shall be binding. If the withdrawal prevents the continuation of the proceedings, the tribunal may request that the absent arbitrator be replaced and, if the procedure employed for his appointment fails, may request the President of the International Court of Justice to replace him."

177. The fourth sub-paragraph of the above-quoted paragraph, in accordance with which "an arbitrator may not participate in the judgment of a case with which he has previously had to deal in any capacity," gave rise to some discussion. Some members of the Commission regarded the formula as too broad, asking whether an arbitrator appointed by one party should be disqualified because he had dealt with related cases or had, as a teacher or author, expressed opinions concerning the case at issue. They pointed out that the character of the arbitrators appointed by the parties was to a certain extent special and that, in accordance with established practice, Governments should be given wide latitude in the choice of such arbitrators and be allowed, if need be, to appoint legal experts in their service. It was proposed that the words "with which he has previously had to deal" should be replaced by the words "in which he had previously participated."

178. The Commission unanimously accepted the following general formula:

"No party may appoint as national arbitrator a person who has previously been actively connected with the particular case submitted to arbitration."

179. The fifth sub-paragraph of paragraph III concerning challenge (*récusation*) also gave rise to some discussion. Doubts were expressed as to the advisability of including a provision concerning the challenge of arbitrators. If provision had been made for the challenge of judges in the case of a judicial tribunal it was because the constitution of such a tribunal, unlike an arbitral tribunal, was permanent and the judges were not appointed by the parties. The special rapporteur said that challenge was permissible only where a new fact, such as the insanity or venality of an arbitrator, had come to light after the appointment of the arbitral tribunal. Divergent views were expressed as to whether the arbitral tribunal or the International Court of Justice should decide on the challenge. Finally, it was suggested that the question should be reconsidered in the light of the views expressed by members of the Commission.

180. The sixth sub-paragraph of paragraph III concerning the resignation of the national arbitrator or his withdrawal by the Government which appointed him gave rise to a lengthy discussion. In the special rapporteur's view, when arbitrators had been appointed they exercised their functions on behalf of both parties. They were independent of the Government which appointed them and that Government could not therefore withdraw them or instruct them to withdraw. The resignation of an arbitrator should be subject to acceptance by the arbitral tribunal. Some members of the Commission thought this view went too far. Arbitration differed from judicial settlement of disputes in that its procedure was more flexible; consequently, various questions must be left to the agreement between the parties. It would discourage arbitration if unduly strict rules were imposed on Governments. Other members of the Commission replied that it was essential that the new code of arbitral procedure should prevent the parties from evading the obligations to which they had subscribed and from paralysing arbitration.

181. The Commission agreed to request the special rapporteur to submit, at its next session, a revised draft taking into account the views expressed during the discussions.

CHAPTER III

REGIME OF THE HIGH SEAS

182. The International Law Commission, at its first session, elected Mr. J. P. A. François special rapporteur to study the topic of the regime of the high seas. At its second session, Mr. François submitted his report (A/CN.4/17) on the topic. The Commission had before it also the replies of Governments (A/CN.4/19, Part I, C) to a questionnaire circulated by it.

183. The Commission considered this topic at its 63rd to 69th meetings, using as a basis of discussion the report of the special rapporteur. In this report, Mr. François set out the various subjects which might be studied with a view to the codification or the progressive development of maritime law. The Commission was of the opinion that it could not undertake a codification of maritime law in all its aspects and that it would be necessary to select the subjects the study of which could be begun by the Commission as a first phase of its work on the topic.

184. The Commission thought that it could, for the time being, leave aside all those subjects which were being studied by other United Nations organs or by the specialized agencies.²⁷ The Commission also left out subjects which, because of their technical nature, were not suitable for study by it. Lastly, it set aside a number of subjects the limited importance of which did not appear to justify their consideration by the Commission in

²⁷ On this matter, see memorandum by the Secretariat (A/CN.4/30).

the present phase of its work. The subjects retained by the Commission are set forth in the following paragraphs.

NATIONALITY OF SHIPS

185. The Commission considered that an attempt should be made to determine the general principles governing this matter in the various countries. It invited the special rapporteur to submit a further report on this subject at its next session.

186. With regard to the question of ships without a nationality and of ships possessing two or more nationalities, the Commission adopted the principle that every ship should have a flag and one flag only.

COLLISION

187. The Commission decided to disregard, for the present, problems of private international law involved in the question of collision. The Commission considered it important, however, to determine which court was competent in criminal cases arising out of collision and that, after the case of the *Lotus* and its repercussions throughout the world, it could not remain silent on the subject. The special rapporteur was requested to make a study of the subject and to propose a solution to the Commission at its next session.

SAFETY OF LIFE AT SEA

188. The Commission ascribed great importance to the international regulations for preventing collisions at sea, which constituted Annex B of the Final Act of the London Conference of 1948. The special rapporteur was requested to study the question and to endeavour to deduce from these regulations principles which the Commission might discuss at its next session.

189. The Commission took the view that principles could be formulated, taking into account Article 11 of the Brussels Convention of 23 September 1910 for the Unification of Certain Rules Relating to Assistance and Salvage at Sea, which provided that after a collision the captain of each of the ships was bound to lend assistance to the other ship insofar as he could do so without serious danger to his ship, his passengers and his crew, and taking into account also Article 8 of the Convention of 23 September 1910 for the Unification of Certain Rules Relating to Collision, which provided that the captain of a ship was bound to render assistance to every person found in the sea in danger of his life, insofar as he could do so without serious danger to his ship, his passengers and his crew.

THE RIGHT OF APPROACH

190. Detailed consideration of this question was deferred until the next session.

THE SLAVE TRADE

191. The Commission requested the special rapporteur to study treaty regulations in this field with a view to deriving therefrom a general principle applicable to all vessels which might engage in slave trade.

SUBMARINE TELEGRAPH CABLES

192. The Commission agreed on the principle that all States were entitled to lay submarine telegraph and telephone cables on the high seas and considered that the same principle should also apply to pipelines. The Commission requested the special rapporteur to include proposals to that effect in his report for the next session, and at the same time to examine the question of protective measures.

RESOURCES OF THE SEA

193. The Commission requested the special rapporteur to study the problem of protecting the resources of the sea for the benefit of all mankind by the generalizing of measures laid down in bilateral or multilateral treaties. It was agreed that consultations might have to be held with other organizations, especially technical organizations, which dealt with the question of the protection of the resources of the sea.

RIGHT OF PURSUIT

194. The Commission will resume consideration of the right of pursuit at its next session, on the basis of proposals to be drafted by the special rapporteur, with due regard to the results of the Codification Conference held at The Hague in 1930.

CONTIGUOUS ZONES

195. The Commission took the view that a littoral State might exercise such control as was required for the application of its fiscal, customs and health laws, over a zone of the high seas extending for such a limited distance beyond its territorial waters as was necessary for such application.

196. The Commission requested the special rapporteur to assemble the fullest possible documentary material on claims made by States and on the measures adopted by them with regard to their contiguous zones, such material to include information as to the various limits laid down by States.

SEDENTARY FISHERIES

197. After an exchange of views, the Commission requested the special rapporteur to study existing regulations governing sedentary fisheries and to report on his findings at the next session.

THE CONTINENTAL SHELF

198. The Commission recognized the great importance, from the economic and social, as well as from the juridical points of view, of the exploitation of the sea-bed and subsoil of the continental shelf. Methods existed whereby submarine resources might be exploited for the benefit of mankind. Legal concepts should not impede this development. One member of the Commission expressed the view that the exploitation of the products of the continental shelf might be entrusted to the international community; the other members considered that there were insurmountable difficulties in the way of such internationalization. The Commission took the view that a littoral State could exercise control and jurisdiction over the sea-bed and subsoil of the submarine areas situated outside its territorial waters with a view to exploring and exploiting the natural resources there. The area over which such a right of control and jurisdiction might be exercised should be limited; but, where the depth of the waters permitted exploitation, it should not necessarily depend on the existence of a continental shelf. The Commission considered that it would be unjust to countries having no continental shelf if the granting of the right in question were made dependent on the existence of such a shelf.

199. The Commission agreed that, where two or more neighbouring States were interested in the submarine area of the continental shelf outside their territorial waters, boundaries should be delimited. It should not be possible for States to penetrate into the region attributable to another State for purposes of control and jurisdiction.

200. In the opinion of the Commission, the sea-bed and subsoil of the submarine areas above referred to were not to be considered as either *res nullius* or *res communis*. The sea-bed and subsoil were subject to the exercise, by the littoral States, of control and jurisdiction for the purposes of their exploration and exploitation. The exercise of such control and jurisdiction was independent of the concept of occupation. There could be no question of such right of control and jurisdiction over the waters covering those parts of the sea-bed. Those waters remained under the regime of the high seas. The exercise in them of navigation and fishing rights might be impaired only insofar as was strictly necessary for the exploitation of the sea-bed and subsoil. For works and installations established in the waters of the high seas for working the sea-bed and subsoil, special security zones might be set up, but they could not be classed as territorial waters. The Commission considered that protection of the resources of the sea should be independent of the concept of the continental shelf.

201. The Commission requested the special rapporteur to submit, at its next session, a further report and to include therein concrete proposals based on the conclusions above set forth.

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